

2511
No. 11820

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

secret. 2510
TAVARES CONSTRUCTION COMPANY, INC., a
corporation, CONCRETE SHIP CONSTRUCTORS,
a joint venture, STROUD-SEABROOK, a copartner-
ship, LLOYD S. STROUD, R. S. SEABROOK,
C. M. ELLIOTT, CARLOS TAVARES, HENRY
M. PAGE and DON F. GATES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME III


(Pages 741 to 1108, Inclusive)

Upon Appeal From the District Court of the United States
for the Southern District of California
Southern Division

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(Testimony of Carlos Tavares)

Q. By Mr. John M. Martin: You are familiar with Exhibit W, the original Tavares Construction Company lease, and with all amendments? A. Yes.

Q. And the provisions thereof? A. Yes.

Q. Will you take into consideration such provisions in giving us your opinion as to what is a fair and reasonable supervisory fee for the services here rendered by the contractor to the Defense Plant Corporation, in connection with the construction of the particular facilities, machinery and shipyard here involved?

A. The provisions in the agreement—

Mr. Landrum: Just a moment. Now, if the court please, he is not answering the question.

Q. By Mr. John M. Martin: You are not asked for the provisions. You are asked if you have an opinion as to a fair supervisory fee, and to which you answered you did have? A. Yes, sir.

Q. Now, I ask you to state that opinion either in dollars or in percentage. A. It is 10 per cent.

Q. Ten per cent of what?

A. Of the actual construction costs.

Q. Will you state upon what you base that opinion? [454]

A. That is a minimum fee that a contractor is entitled to when he builds anything for a guaranteed cost.

Q. What have you included within the 10 per cent, if anything, for designing or other engineering services?

A. I did not include anything for designing or engineering services. If I had to go out and get engineering services, I would probably have to pay the engineer, oh, about two per cent.

(Testimony of Carlos Tavares)

Q. Two per cent?

A. Two per cent for his services.

Q. Based upon the same aggregate total of the same actual cost?

A. It would be based upon the total cost of the job, which would include our fee. The actual engineering fee would be 5 per cent, but 3 per cent of which the engineer would spend probably for other engineers and costs in running his office, and so forth. [455]

Q. By Mr. John M. Martin: Is that the reason you have made a deduction from 5 to 3 per cent and stated, in your opinion, it is 2 per cent as an engineering fee from the time the shipyard was completed and actual ship construction work begun? A. Yes, sir.

Q. What were your duties in connection therewith?

A. I went to work every morning at 8:30.

Q. Where?

A. At the shipyard; went home for dinner; came back and stayed there to about 11:00 o'clock, seven days a week, every day of the year, for about two and a half years.

Q. You didn't take any time off for trips to Washington to interview the departments?

A. That was all.

Q. What was the general nature of your duties while you were on duty at the shipyard or thereabouts?

A. I poked my nose into everything. There were no particular duties I had.

(Testimony of Carlos Tavares)

Q. Well, were you the managing or executive head of the Concrete Ship Constructors?

A. We were a joint venture, a partnership, so to speak, and Mr. Seabrook and I and later on Mr. Elliott all participated in the management of the shipyard.

Q. Were you then and are you now the owner of any un-[456] divided interest in the Concrete Ship Constructors, the joint venture?

A. Yes, sir; I am an owner of an undivided one-fourth interest in that Concrete Ship Constructors.

Q. And did the Tavares Construction Company own the leasehold estate here involved, for the use and benefit of the joint venture? A. They did.

Q. When you say that you poked your nose into everything, did you mean by that that you were at all familiar with the actual condition of these facilities and machinery, as of December 23, 1944?

A. Yes, sir.

Q. What was the general condition of the facilities and machinery as of that date?

A. It was in very excellent shape because we were doing—well, it was in very good shape.

Q. At that date did the Tavares Construction Company or Concrete Ship Constructors as lessee require the further substantial use of those shipyards for the completion of the then existing contracts with the United States Government for construction of ships?

A. There was a lull right at that time. All we had was two ships left to complete.

Q. How many had you theretofore completed and delivered [457] out of this yard? A. 47.

(Testimony of Carlos Tavares)

Q. And what was the state of completion of the two remaining vessels as of December 23, 1944? I have in mind not the details but any fact which would tend to show whether or not any substantial use of the facilities and machinery would be required thereafter for the purpose of completing said last two ships.

A. That was December 23, 1944?

Q. Yes, sir.

A. I believe we were—or I don't remember exactly but I believe that one of the ships was at the dock and the other one was in the outfitting pier. I would say only probably 80 per cent of the yard was actually being used.

Q. What per cent?

A. I mean only 20 per cent of the yard was actually being used.

Q. On what date, if you know, was actual completion of the two remaining ships advanced to the state where a larger minor percentage than 20 per cent of the total shipyard was required for their completion?

A. I can find that out for you but I don't remember exactly. But I think it is—

Q. Don't guess at it. Do you happen to know the date of actual completion of those two ships? [458]

A. Yes; they were finished some time in May, I believe.

Q. Of 1945?

A. Well, I am not sure about that, either.

Q. Have you an opinion, from your knowledge and familiarity with the shipyard and its facilities and machinery, and your general experience in designing and layouts, and your knowledge of the site location, to enable you to form an opinion as to the fair market value of

(Testimony of Carlos Tavares)

the facilities and machinery, excluding therefrom any valuation of the site or land upon which they are based, as of December 23, 1944?

A. Will you please repeat that question?

(Question read by reporter.)

Mr. Landrum: The answer is yes or no, please.

Q. By Mr. John M. Martin: Have you an opinion?

A. Yes.

Q. Will you state in dollars that opinion?

Mr. Landrum: If the court please, I have an objection here which I desire to make to that question. I don't know whether your Honor desires that I make it in the presence of the jury or not.

The Court: I think so.

Mr. Landrum: If your Honor please, it is objected to on the ground and for the reason, first, that it is a giving of a valuation on only a portion of the whole, with no alloca-[459] tion and no evidence going to show what relationship that has to the whole; in other words, a valuation of only a portion of the thing with which we are here concerned, given separately; second, upon the ground and for the reason that it goes to the question of the valuation of this leasehold interest and option, and that any value to be given this lease, coupled with an option, can only be based upon speculation and conjecture by the very terms of the instrument itself; third, that any value which may be given to this lease, coupled with an option, must include, within itself, an improper element, the value of a so-called option which never came into existence; fourth, that such value must include, within itself, some element or increment for the so-called option, and an option is not an interest in real property such as may be

(Testimony of Carlos Tavares)

compensated for in a condemnation case; fifth, that such value, including within itself an element or increment for the so-called option, is improper because it would require the government to pay for something it has itself made. No value could be attributed here except by virtue of this very condemnation case itself.

The Court: Of course, several of these specifications have already been ruled upon by the court in its other rulings, which are in the record. The ruling on the pre-trial was a ruling that was effective as to certain portions of the objection now interposed, and this court is not going to at-[460] tempt to review a court of coordinate authority in the same case. Manifestly, the answer must be limited to the facilities and machinery that were component parts of the project. So that that portion of the objection has no merit. But it is a question of argument to the jury on the factual deductions to be made from whatever answer may be given after further exploration of the elements that are necessarily included in the question and must be included in the answer. Of course, ladies and gentlemen, the jury cannot speculate or conjecture or guess about values in a condemnation suit. They must not imagine things that will exist in the future because that is not a fair basis of estimating value, for the very apparent and obvious reason that the human mind is finite. We haven't reached the stage of perfection in mental acquisition, where we can foretell and look into the future with definiteness, with certainty. So that, in law, there must be a standard, a fixation, a definiteness, reasonably compensation to which a litigant is entitled. And you must remember that at the time for you to apply this evidence. That rule must be kept constantly in mind,

(Testimony of Carlos Tavares)

and you are not to emerge from reasonable probabilities discernible from evidence into imaginary speculation or conjectural attitudes not sustainable in law. Otherwise, the objection is overruled.

Mr. Landrum: If your Honor please, I would like to [461] have the record show a specific exception to your Honor's ruling.

The Court: It may so show.

Q. By Mr. John M. Martin: You may answer in dollars, Mr. Tavares, your opinion. A. In 1944—

The Court: That is December 23, 1944.

The Witness: December 23, 1944, those facilities were worth approximately \$500,000 more than the option price set forth in the Defense Plant agreement.

Q. By Mr. John M. Martin: Are you referring now to the option price as calculated by Mr. Gregory Smith and here in evidence as Exhibit Q?

A. \$2,145,000, and add another \$500,000 on top of that is \$2,6—whatever it is.

The Court: Let's have that read.

(Answer read by reporter.)

The Witness: \$2,645,000.

The Court: What is your answer to the question? The question was clear and specific.

The Witness: \$2,645,000.

Mr. John M. Martin: May I refresh the witness' recollection, your Honor, by showing him an exhibit which I have here?

Mr. Landrum: I object to that cross examining his own witness. He has already answered it.

The Court: Of course, the jury must consider the answer of the witness as he gave it; that is what you are

(Testimony of Carlos Tavares)

here for, ladies and gentlemen; not to sit here as automatons and take figures, but you are to use your processes in discerning the recollections and all of the other features that go to make up the value of evidence that is given by a witness. Proceed.

Q. By Mr. John M. Martin: Will you state the basis for that opinion?

A. In there, I have added my fee of 10 per cent and 2 per cent for engineering and the increased cost in construction, from 1942 to 1944.

Q. Have you calculated or prepared any estimate as to the fair replacement cost of these facilities and machinery as of December 23, 1944?

Mr. Landrum: Will you go a little slower? I am having to write this down.

The Court: You have a reporter here who can get it all. Go right ahead, Mr. Witness, but eliminate the argument and deductions. We have a lot of lawyers here and we will probably listen to a lot of argument. So we must confine witnesses to testimony.

The Witness: By adding all these values together, I arrived at the figure of \$750,000 as being a very fair price for any willing buyer in 1944 because right at that time the [463] facts show that there was a war on and the facts show that thousands of ships were returning to this country to be repaired; the facts show that there weren't any of the yards suitable and capable of taking on a large volume of work.

(Testimony of Carlos Tavares)

Q. How many men could reasonably work in this yard on the number of ships customarily worked on?

A. We have worked 4,000 men at this yard and we have worked 500.

Q. Is there any feature of the yard or any element in the designing where you intended to take into consideration and so design the yard that it might be readily adaptable to use 500 men working there or as many as 4,000 men working there?

A. Yes; we took that all into consideration. We have worked economically with 500 men, 3,000 men and 4,000 men. Our records prove that.

The Court: Mr. Martin, if you are going to pursue any other line of inquiry, we will take our recess now.

Mr. John M. Martin: Just one more question and I am through.

The Court: All right.

Q. By Mr. John M. Martin: Mr. Tavares, when you spoke of taking into consideration the rent-free use provision or the use under this lease, I will ask you if that rent-free use to which you referred is limited to the use of this yard [464] and its facilities for the construction of ships for the government.

A. Yes, sir.

Mr. John M. Martin: That is all.

The Court: We will take our recess, ladies and gentlemen. Remember the admonition which I have heretofore given you. Please occupy the jury room.

(Short recess.) [465]

(Testimony of Carlos Tavares)

The Court: All present. Proceed with the cross examination.

Cross Examination

By Mr. Landrum:

Q. Mr. Tavares, am I correct in my statement to you of your conception of the meaning of market value, that that means that, in your opinion, whatever interests you and your companies may have by virtue of Exhibit W, which is known to you and I as Plancor 407, would sell on the open market for cash on the 23rd day of December, 1944—

Mr. John M. Martin: If the court please, I object to the question unless it is limited to interests in this property here sought to be condemned. He says, "whatever interests."

Mr. Landrum: I am perfectly willing to limit it to that.

Q. By Mr. Landrum: Is that what you mean?

A. By market value I mean a willing seller to a willing buyer who would buy my leasehold estate.

Q. That is right. In other words, to boil it down, it is your opinion that you could get that much money for an assignment of whatever rights you had in this property under that lease and option agreement; that is what you mean?

A. I have told you on certain assumptions. [466]

Q. Yes. Well, I understand that, but that is what it boils down to, isn't it? A. No.

Q. What is it, then? A. It is my interests—

Q. Yes, it is. A. —in the leasehold estate.

(Testimony of Carlos Tavares)

Q. That is right. And whatever interests you have stem from your agreement with the Defense Plant Corporation? A. Correct.

Q. That is right, all right. Now, Mr. Tavares, do you have a copy of this exhibit W? A. No.

Mr. Landrum: I believe the jury has copies of this exhibit.

The Court: I believe you all have them, ladies and gentlemen.

Mr. Landrum: The record will show, if the court please, with the court's permission, that Mr. Martin has just handed to Mr. Travares a copy of Exhibit W.

Q. By Mr. Landrum: Now, Mr. Tavares, let's you and I go over the instrument which you say has a market value of \$750,000. Go with me to paragraph 9 of that exhibit. In arriving at your conclusion with relation to the fair market value of what you could sell this instrument for, or your [467] interests under it, did you take into consideration the provisions of paragraph 9 thereof?

A. Yes, I did.

Q. Paragraph 9 provides, does it not:

"No salaries of Lessee's executive officers, no fees of its attorneys, no part of the expense incurred in conducting Lessee's offices and no overhead expenses of any kind shall be included in the cost of leasing the Site or the Programs, except that direct expenses of Lessee's Officers or employees and fees of attorneys retained or employed by Lessee in connection with the Programs may be so included to the extent approved by Defense Corporation."

A. Correct.

Q. You understand that? A. Most certainly.

Q. Your salary,—you are an executive officer, are you not, of this corporation? A. Surely.

(Testimony of Carlos Tavares)

Q. Your salary, according to your bookkeeper, was charged to and paid for out of the money that the Defense Plant Corporation put in here, was it not?

A. "may be so included to the extent approved by the Defense Plant Corporation" and was so approved. The [468] salary of \$6,000 was for five individuals working for a whole year to build \$2,900,000 worth of facilities.

Q. Now, Mr. Tavares, it is a fact, is it not, that you and Mr. Seabrook, and a number of the executive officers of your companies, did pay to yourselves out of the money that the government of the United States put up here, your salaries while you were doing this construction of that shipyard? Just tell me "Yes" or "No."

A. Certainly.

Q. You, therefore, violated the terms of this agreement in the beginning, did you not?

Mr. John M. Martin: To which I object as not a proper question, and an insinuation, particularly in view of the record, counsel having stipulated that Exhibit W, as received in evidence, correctly sets forth the actual costs and the option price.

Mr. Landrum: I did agree to that.

The Court: The objection is sustained.

Q. By Mr. Landrum: Now, Exhibit Q was a tabulation, and I believe the jury has the tabulation, and that was taken from the actual invoices, the actual accounts that you gentlemen submitted to the government of the United States and which it paid; that is right, is it not?

A. As audited.

Q. But they paid it? [469] A. Yes.

Q. All right. I want to show you this little memorandum here.

(Testimony of Carlos Tavares)

Mr. John M. Martin: May I see it before you show it to the witness?

Mr. Landrum: Yes. That is one of the sheets that was made from.

Mr. John M. Martin: No objection.

Mr. Landrum: Your Honor, please, I did not intend to offer it in evidence, but counsel says he has no objection.

Mr. John M. Martin: No, I said no objection to showing it to the witness.

The Court: I haven't the slightest idea what it is. Let me see it. Perhaps I may see an objection to it.

Mr. Landrum: I was not going to offer it in evidence, but I was simply going to show it to this witness so I would not confuse him.

Q. By Mr. Landrum: Mr. Tavares, Exhibit Q, of course we know was made from the actual invoices.

A. I thought you were going to show that to me.

Q. I will be glad to. That is No. 2 of 11(d); that is a copy of one of them; that is right, isn't it?

A. Yes.

Mr. Landrum: Now, could I go up there so that he and I could both look at it? [470]

The Court: Yes, just so each of you gentlemen will be properly respectful to each other.

Mr. Landrum: Yes, sir. I will be very happy to get along.

Q. By Mr. Landrum: Now, this is what we term service charges, is it not?

Mr. John M. Martin: Just a minute. I object to counsel reading into the record in this case anything that has not been received in evidence.

(Testimony of Carlos Tavares)

Mr. Landrum: I am not reading it in the record.

The Court: How can a jury discern what it is unless it is before them?

Mr. Landrum: Well, I will withdraw the question.

Q. By Mr. Landrum: Attorney's fee, \$50, who got that?

Mr. John M. Martin: To which I object as not any evidence in this case that anybody received it.

The Court: If the audience cannot conduct themselves with propriety; they will have to leave the room. We don't want any indication in the court room as to how they feel about the evidence.

Mr. John M. Martin: If the court please, I appreciate your admonition.

The Court: Mr. Bailiff, you will see that order is enforced, and if the men can't sit here in the court room [471] quietly, without exhibiting their emotions, they will have to leave the court room. That means all of you.

Now, will you read the record, Miss Reporter?

(The record was read.)

The Court: The objection is sustained.

Q. By Mr. Landrum: Mr. Tavares, I understood you to say that this lease and option was your pay or your supervisory fee for the construction of these facilities; is that correct? A. I didn't say that.

Q. Well, isn't that correct?

A. What do you mean by that?

The Court: Raise your voice, gentlemen, so that we can hear what you say, both of you.

Q. By Mr. Landrum: Is it not the claim of the Tavares Construction Company in this case that the consideration for the execution of Exhibit W by the Defense

(Testimony of Carlos Tavares)

Plant Corporation was to cover your supervisory fee for the installation of these facilities and the building of this shipyard?

A. This agreement says that I am only allowed to charge such expenses, either salaries or legal expenses, that the Defense Plant Corporation's auditors will allow, and that we should charge no other fees for supervisory services in this agreement. We have followed this to this extent, that [473] this has passed through the hands of all the different boards, renegotiation boards, auditors of the Defense Plant Corporation, auditors of the Maritime Commission and found correct.

Q. We don't deny that.

A. That we have lived up to this agreement of lease.

Q. All right. Now, in the list which was paid for the construction of this shipyard is an item, "Consultant's fee, \$25,678.21,"—did any of the officers of your company receive any of that \$25,000?

A. I don't know what this Consultant's fee is, but I can assure you that no officer in the corporation ever received \$25,000 out of this agreement for any lease whatsoever. I would like to find out what that is. You will find out those are probably the way they had worked this out.

Q. You did, however, pay your consultants this money?

A. I am sure we only paid a fee to Dames & Moor of about five or six hundred dollars, and if that thing was set down as consultant's fees, it is all wrong.

Q. It is your own record, isn't it?

A. Well, in order to clarify that, I think we should bring in the records. That isn't correct. We will bring them in.

(Testimony of Carlos Tavares)

Q. Here is an item charged here, for which the Defense Plant Corporation paid, "Construction Supervision [473] Not Distributed, \$1,257.69." What does that mean?

A. It means that—under normal contracts you have people that build something, and you have inspectors. Now, the Defense Plant Corporation and the Maritime Commission, through the fact that they didn't have any, asked us to hire these men so that the work should proceed properly. That is a real true job cost.

Q. It was then paid for supervision to someone?

A. It was not supervision. It was inspection.

Q. All right. Here is an item, "Purchasing, \$9,433.-64." Who did that purchasing?

A. The Tavares Construction Company did the purchasing. That is very cheap.

Q. Did you say, "That is very cheap"?

A. Yes.

The Court: Keep your voice up, so that we can all hear you.

Q. By Mr. Landrum: "Miscellaneous general expenses, \$28,129," do you have any idea what that was for?

A. It is just what it says, Miscellaneous general expenses, such as telephone, telegraph. You will notice it is telephone and telegraph, and other things that you can't allocate. They are all perfectly all right, audited and passed on by everybody.

Q. But these items were included and paid for by the [474] government of the United States?

A. We followed this book.

Q. All right. Let's follow it now. Go with me to paragraph 12, the second paragraph under that, of Ex-

(Testimony of Carlos Tavares)

hibit W. In arriving at your conclusion with relation to the fair market value of the interests which you acquired hereunder, do you think that you could sell your interests with that paragraph in it for \$750,000 on the 23rd day of December, 1944, to an informed and willing buyer?

A. What does the paragraph say?

Q. It says, follow me:

“This lease or any extension thereof under this paragraph Twelve may be terminated by the parties hereto in the manner hereinafter set forth.”

And this is the thing I want you to follow:

“At any time when substantial use by Lessee of the Site Facilities and Machinery shall be no longer required to enable Lessee to construct boats for the Government . . .”

You only had this lease for the purpose of constructing boats for the government; is that right?

A. No, I have got an option to buy this thing too.

Q. But it provided, however, that the whole thing could be canceled under paragraph 12, did it not?

A. It provides that it can be canceled by the government. [475] It also provides that I could cancel it “when substantial use by lessee of the Site Facilities and Machinery shall be no longer required to enable Lessee to construct boats for the Government.” One day before the condemnation suit my shipyard was not substantially used for constructing boats for the government.

Q. That is right. As a matter of fact, on the 23rd day of December, 1944, you only had one outstanding contract for the construction of boats for the government, did you not? A. Yes, sir.

(Testimony of Carlos Tavares)

Q. And on that contract you only had two more boats to build, did you not? A. That's right.

Q. And those two boats, according to your own testimony, were completed and delivered to the government on or about the 10th day of May, 1945?

A. That is right.

Q. All right. Do you think that you could find a willing buyer to pay you \$750,000 for the right to construct boats for the government, unless he had his contract to build boats for the government?

A. On December 23, 1944—are you through? You are asking me a question?

Q. Go ahead, yes, sir.

A. On December 23, 1944, if the government—I can't say that, can I? Or, can I? [476]

Q. I don't know. You know the court's ruling, Mr. Tavares, as well as I do.

A. I could have elected to terminate my lease. The government did not elect to terminate the lease, according to this program.

Q. That is right.

A. Otherwise—

Q. But at that time you are selling it like this.

Mr. Crouch: He hasn't finished his answer.

Mr. Landrum: I beg your pardon. Now, if your Honor please, I want to conform absolutely to the rule. I don't know whether this witness understands your Honor's ruling on this question or not.

Q. By Mr. Landrum: You understand we are concerned here with a date, December 23, 1944?

A. Right.

(Testimony of Carlos Tavares)

Q. You understand that, to put it in the parlance of the street possibly, that there was a termination there?

A. No, a condemnation.

Q. A termination of your rights under your lease, and it is what you had at that time that you are now valuing; isn't that right?

A. That's right.

Q. All right. All you had was a contract to complete two more ships for the government? [477]

A. No, I had a contract with the Defense Plant Corporation, a branch of the government, that it is going to give me certain things, which they took away from me.

Q. All right. And whatever it was that you had is set forth right in the language of Exhibit W, isn't it?

A. They didn't follow this contract.

Mr. Landrum: Now, if the court please, I move that that answer be stricken and the jury be instructed to disregard it.

The Court: That will go out, ladies and gentlemen, and be disregarded.

Q. By Mr. Landrum: There was contained in Exhibit W a provision with relation to the amount of rent which you would have to pay under it, was there not?

A. Yes, sir.

Q. That provision, I don't think we need read it. I will cite it to you, if you wish, but we can talk about it. It is paragraph 13.

A. Okay. Go ahead.

Q. Paragraph 13. That provision provided that as you built and completed a ship from the moneys which the government was to pay you for that ship you were to pay them certain rental, out of the money you got for the ship; that is right, isn't it?

A. That is correct. [478]

(Testimony of Carlos Tavares)

Q. You sold these ships to the government of the United States; that is right, isn't it?

A. That is right.

Q. When you would sell a ship, out of the money you were going to get would come back to the government of the United States as rental a portion of the \$2,700,000 it put up to build that shipyard; is that right?

A. That is common practice.

Q. I understand. But that is the situation, isn't it?

A. It is common practice when I build a house.

Q. All right. The amendments to Plancor 407 provide for an increase in that rental as to each ship, do they not?

A. Yes, or you mean on certain amendments there was more money on certain ships?

Q. Yes. We will get together on the situation. As you went along it took more money? A. No.

Q. Well, you got clear up to \$2,700,000?

A. That was because the program changed as it went along. Many ships were needed. May I explain that?

Q. Yes.

A. The program changed as we went along. For instance, they analyzed certain things, and they wanted more ships, they wanted ships faster, they wanted more things in the ships. The Navy came along and wanted to change the ships [479] and requested certain features, and when the government changed their mind, and we required facilities there, we agreed on a price to build those facilities.

Q. As a matter of fact, you started out with \$404,000 and when you got through it had gone up to \$2,700,000?

A. Sure. The government changed its mind as we went along.

(Testimony of Carlos Tavares)

Q. And you agreed with the change?

A. They needed the ships and we delivered them.

Q. And you were paid for them?

A. Certainly, it was paid for.

Q. Your rental under paragraph 13, when you started out, was \$83,327 each time you delivered a ship; that is, they kept back that much money, and for which you were to pay rent?

A. They kept back nothing. They paid us, and we paid the Defense Plant Corporation.

Q. You paid it, all right. When you got up to where you got \$2,700,000, I am talking in round figures, in this project, the rental which you were to pay down here increased until you paid them \$140,000 for each ship.

A. Yes.

Q. Now, Mr. Tavares, your whole rental price and agreement was contingent on how many ships you built, wasn't it?

A. No, sir. We built 49 ships. 27 of those ships had [480] free rental.

Q. That is right. After you got 22 ships built, you built more for the government and sold them to them and didn't have to pay any rent; that is right, isn't it?

A. Correct.

Q. That is right. But if you weren't building ships for the government, you didn't have this property rent free, did you?

A. I didn't want to build ships for any other than the government during the war.

Q. But if you say you had the leasehold rights in this property, that you had that lease, you didn't have any right to use that property for any purpose except build-

(Testimony of Carlos Tavares)

ing ships for the government, unless you paid rent, did you?

A. It doesn't say that in this lease. The only thing it says in this lease is that I have the option to buy when the thing is to be terminated.

Q. You say it doesn't say that?

A. No, sir. It says for boats for the government. It doesn't say for anybody else.

Q. That is right. What I am getting at is this, and I don't think we are in disagreement on it: You had to pay rent and you had to get the permission of the Defense Plant Corporation and the Maritime Commission to use this yard for any purpose other than to build boats for the government. [481] didn't you?

A. I had an agreement which I lived up to.

Q. That is right. But you had to do that, didn't you?

A. So did they, to give me back my option.

Q. Now, it is your opinion that with this provision in there that you had to be building boats for the government or otherwise you had to get their permission and make an arrangement with them, and you still think you could have sold this lease in the open market for \$750,000?

A. Without any question of a doubt.

Q. All right. Are you, Mr. Tavares, basing your opinion with relation to the fair market value of this property on your own ability to sell it?

A. No, sir. All I have to do is to go and say: 5 cents a square foot in Los Angeles for the same piece of property.

Mr. Landrum: I move that that answer or that portion of the answer, rather, in which he recites that he could have bought the same piece of property in Los Angeles for 5 cents a square foot—

(Testimony of Carlos Tavares)

The Witness: I didn't say that.

Mr. Landrum: —be stricken out.

The Court: Yes, the motion is granted. That will go out and be disregarded.

Q. By Mr. Landrum: Now, Mr. Tavares, will you go [482] with me again to the instrument from which your rights stem, in other words, Exhibit W, in paragraph 14 thereof,—paragraph 14. Were you familiar with the terms of that paragraph when you stated your opinion with relation to the price for which you could have sold this instrument on the open market for cash? Are you reading paragraph 14?

A. Yes, I am. Yes, surely.

Q. All right. Now, that paragraph says that the "Defense Corporation, by notice in writing with the approval of the Maritime Commission noted thereon, may, in addition to all other rights with reference to termination under paragraph twelve hereof, cancel this lease or extension thereof, in the event (a) all or substantially all of Lessee's contracts with the Government, at any time outstanding, for the construction of concrete barges and other boats shall be terminated or cancelled prior to completion," does it not?

A. If that shall be terminated or cancelled.

Q. It provides that the Defense Corporation can cancel that instrument at any time that your contracts for the construction of concrete barges and other boats shall be terminated or cancelled, does it not?

A. Yes, if I don't live up—what it means here is if I don't live up to my contracts with the Maritime Commission, and don't do a good job, then, of course, they can cancel. If I have lived up to all of the conditions and

(Testimony of Carlos Tavares)

terms, [483] and the conditions of that agreement and my other contracts—well, three shipyards were terminated.

Q. The only contract you had, Mr. Tavares, on the 23rd day of December, 1944, was a contract upon which you only had two more boats to complete, and they were substantially completed at that time, or were at least completed in May, 1945?

A. Right. They didn't terminate that contract though.

Q. No, I understand. They could have though, couldn't they? A. They wouldn't.

Q. Why didn't you terminate it?

A. I can't terminate a contract. I am talking about the boat contracts. I am talking about the ship contract.

Q. All right. If your rights under that contract were worth \$750,000, why didn't you say to the government of the United States, "I desire to exercise my option"?

A. Because I wanted to keep it, because I had free rent until 1949.

Q. You did? A. Yes, sir.

Q. Where do you find that in the instrument?

A. Yes, building boats for the government.

Q. Yes, building boats for the government.

A. Well, I can still be building—oh, that is not [484] allowable here.

Q. Yes. Now, there is a provision in here further, is there not, that under paragraph 14, and this is under sub-paragraph (b) under 14, that "the Government shall request priority for itself or others with respect to the use of the facilities to be provided hereunder, and Lessee

(Testimony of Carlos Tavares)

shall fail or refuse to give such priority,"—then they could cancel it, couldn't they?

A. They could cancel, like they could condemn it, but I still maintain certain rights, that I have given up for that option.

Q. That is right.

A. Certain rights I have here that are definite.

Q. What did you pay for them?

A. My services, for one thing.

Q. All right. A. My time for another.

Q. Yes. A. It is worth a lot of money.

Q. Your services and time for supervising the construction of a shipyard which is to build ships and to sell them to the government of the United States; that is right, is it not?

A. That is correct. Isn't a man entitled to a fee?

Q. You made a fee, didn't you, Tavares? [485]

A. Not on this.

Q. Didn't you tell this court and jury that, in your opinion, a fair supervisory fee for the construction of those facilities was 10 or 12 per cent?

A. Certainly. Certainly, for a guaranteed cost.

Mr. Landrum: Your Honor please, my practice is to ask the clerk to mark the exhibits first, but is it the practice first to show it to the witness?

The Court: Either way. The clerk can mark it.

Mr. Landrum: Would you be good enough to mark that for identification?

The Clerk: Plaintiff's No. 2.

(The document referred to was marked Plaintiff's Exhibit No. 2, for identification.)

(Testimony of Carlos Tavares)

The Court: May I see it, please?

(The document was handed to the court.)

Q. By Mr. Landrum: Mr. Tavares, I show you Plaintiff's, for identification, No. 2, as marked by the clerk of the court.

The Court: Show it to counsel, first.

Mr. John M. Martin: May I see it, first, Mr. Landrum?

(The document was handed to counsel.)

Mr. John M. Martin: No objection. It may be received in evidence.

Mr. Landrum: Your Honor please, at this time, then, [486] there being no objection, we offer in evidence Plaintiff's Exhibit, for identification, No. 2.

The Court: You may read it to the jury, and then have it marked.

(The document, heretofore marked Plaintiff's Exhibit 2, for identification, was received in evidence.)

Mr. Landrum: Ladies and gentlemen of the jury, Plaintiff's Exhibit 2, which is in evidence in this case, reads as follows:

“CONCRETE SHIP CONSTRUCTORS

National City, California

“Post Office Box D

Phone Greeley 7-4163

November 21, 1944

“11th Naval District

San Diego, California

“Attention: Capt. Conger, Industrial Manager

“Gentlemen:

“With reference to our recent telephone conversation, regarding our disposition of the option given

us by the Defense Plant Corporation for and in consideration of the construction of the facilities under Plancor 407, please be advised as follows:

"The Tavares Construction Company, Inc., retains an option under an Agreement of Lease with the [487] Defense Plant Corporation for the purchase or acquisition of the facilities at this shipyard on a depreciated basis. This option is in the form of compensation for having constructed approximately \$2,700,000.00 worth of facilities without profit, and we consider this option of some value. It is not the intent or desire of this company to in any way stand in the way of the acquisition of this property by the U. S. Navy, but we are of the opinion that we are entitled to some consideration.

"We will, if desired, further discuss this matter with you at your convenience.

"Very truly yours,

"CONCRETE SHIP CONSTRUCTORS

"R. S. Seabrook

"R. S. Seabrook

"RSS/mel

Managing Partner"

The Court: Now, Mr. Landrum, have the clerk mark it.

The Clerk: Do you want me to mark this as Government's Exhibit No. 3?

Mr. Landrum: Yes.

(The document referred to was marked Government's Exhibit No. 3, for identification.)

(Testimony of Carlos Tavares)

Q. By Mr. Landrum: I believe you have testified, Mr. [488] Tavares, that, in your opinion, the reasonable and fair supervisory fee for the construction of this shipyard would be 10 per cent, plus 2 per cent for something else.

A. For engineering.

Q. Your companies, the companies of which you are a partner, have heretofore stated that three per cent would be a proper fee, have they not?

Mr. John M. Martin: To which I object as a statement of counsel, and no foundation laid for it, and not a proper statement in the presence of the jury.

The Court: Sustained on the first ground.

Mr. John M. Martin: I have no objection to showing this letter to the witness. I will object to the receipt of the letter in evidence, and I would like to approach the bench and state my reasons.

The Court: The court has inspected the exhibit, for identification, No. 3. Proceed with the examination.

Q. By Mr. Landrum: Mr. Tavares, I show you Plaintiff's, for identification, Exhibit No. 3, and I will ask you to examine it and state what it is.

A. Yes.

Q. What is it?

Mr. John M. Martin: If the court please, I object to the witness stating the contents of the letter, if that is the question. [489]

The Court: It speaks for itself, as to what it is.

Mr. John M. Martin: I object to it. It is, apparently, from the face of it, a part of an unaccepted offer of compromise.

The Court: It has not been offered in evidence yet. The objection is sustained to the question.

(Testimony of Carlos Tavares)

The Witness: This is a negotiation—

The Court: Wait a moment, Mr. Witness. Did you hear the court's ruling on that? Proceed with the examination.

Q. By Mr. Landrum: State whether or not that signature—state if you know, of your own knowledge, that is the signature of Mr. Seabrook, one of the partners.

A. Yes, sir.

Q. State whether or not that is a letter written by Mr. Seabrook to the 11th Naval District. A. It is.

Mr. Landrum: At this time, if the court please, we offer it in evidence.

Mr. John M. Martin: To which I object upon the grounds that—

Mr. Landrum: We offer it as Exhibit No. 3, so marked for identification.

Mr. John M. Martin: We object upon the ground that it is immaterial to any issue in this case, and upon the further ground that it is a part of an unaccepted offer of compromise, [490] which resulted from negotiations carried on between the parties to this action for the period of at least one year.

The Court: May I see it again?

(The document was handed to the court.)

The Court: Objection overruled. Read it to the jury.

Mr. Landrum: Yes, your Honor.

(The document, heretofore marked Plaintiff's Exhibit No. 3, for identification, was received in evidence.)

Mr. Landrum: Ladies and gentlemen of the jury, this is Exhibit No. 3, which you will have:

“CONCRETE SHIP CONSTRUCTORS

National City, California

“Post Office Box D

Phone Greeley 7-4163

November 24, 1944

“Eleventh Naval District

San Diego, California

“Attention: Capt. F. P. Conger, Industrial Manager.

“Gentlemen:

“In explanation of our letter of November 21, 1944, and in compliance with Capt. F. P. Conger’s request, we wish to be more specific regarding the considerations for our release of the option held by this company, for the acquisition of certain facilities (i. e., D.P.C. Plancor 407) at National City [491] California, with the Defense Plant Corporation. These considerations are as follows:

“1. To permit this company the free use of existing facilities to complete necessary war contracts.

“2. To permit this company the free use of facilities to carry on ship repair work for Governmental agencies until such time as the Navy needs to convert these facilities to other purposes.

“3. To give this company a contract for the construction of the necessary Navy alterations to convert property to Navy requirements.

“Alternate for Item 3: Make payment to this company in the sum of 3% of the facilities constructions costs, or \$80,000.00, which is equivalent to a

minimum construction fee for constructing the facilities.

“For your information, no fee or profits was allowed us for the facility construction, but in lieu thereof we were granted an option to purchase and the use of the facilities.

“Yours truly,

“CONCRETE SHIP CONSTRUCTORS

“R. S. Seabrook,

“R. S. Seabrook

“RSS/mel”

“Managing Partner” [492]

Q. By Mr. Landrum: Mr. Tavares, it is true, is it not, that paragraph 1, to permit this company the free use of existing facilities to complete necessary war contracts, you had before you, did you not?

Mr. John M. Martin: To which I object, if your Honor please, as no proper foundation is laid and not the best evidence, and it is an attempt to inquire of an arrangement that may have been entered into with some department of the government subsequent to the date of taking.

Mr. Landrum: Pardon me, your Honor. I will withdraw that question.

Q. Now, Mr. Tavares, let's go again to your agreement. “Fifteen: Upon the expiration or termination of this lease or extension thereof pursuant to paragraph twelve hereof, or upon cancellation of this lease or extension thereof pursuant to clause (a) of paragraph fourteen hereof (unless such cancellation shall have been effected because of a violation by lessee of the contracts referred to in said clause (a), lessee shall have and is hereby

(Testimony of Carlos Tavares)

granted, for a period of ninety (90) days after such termination, expiration or cancellation (hereinafter referred to as the 'Option Period') the right and option, by written notice to Defense Corporation and to the Maritime Commission, to purchase all but not part of the site, facilities and machinery at the following prices—" I will leave out A and B—"whichever [493] is the higher." That paragraph is material in your arrival at your figure, is it not?

A. It was arrived at at the depreciated figure that you admitted in court.

Q. But you had to have that figure in arriving at your conclusion with relation to the market value?

A. No.

Q. You didn't? A. No.

Q. Do you mean to say that you did not arrive at your figure with relation to the market value by virtue of a deduction of what this shipyard and facilities would cost as depreciated under subparagraph (b)?

A. I used it but I don't have to.

Q. That is the paragraph that you used?

A. Yes.

Q. You did not attempt in any way to use paragraph (a), did you? A. No; I didn't.

Q. In arriving at your conclusion with relation to the fair market value of your interest under this agreement, did you consider paragraph 22 of Exhibit W?

A. Yes.

Q. Is it your opinion that a buyer willing but not compelled to buy would pay for your interests under this con-[494] tract \$750,000, with paragraph 22 reading, "Twenty-two: Lessee may use such site, facilities, and

machinery only for the construction by lessee of boats for sale to the government, unless otherwise permitted, in writing, by Defense Corporation with the consent of the Maritime Commission noted thereon.”?

A. Why not?

Q. All right. It is your opinion that he would?

A. Yes.

Q. And then were you familiar with the provisions of paragraph 24 of Exhibit W when you arrived at your conclusion with relation to what this interest of yours could be sold for? It is paragraph 24. Do you have it?

A. Yes.

Q. “Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease.” With that provision in there, do you think anybody would buy it from you?

A. Mr. Government Attorney, I am arriving at the value of my lease due to the fact of termination and under the assumption that I can terminate and obtain this piece of property, which I am able to get by this termination.
[495]

Q. Terminated by yourself? Is that what you mean?

A. I can do that. December 22, 1944, I was permitted to do that.

Q. Do you understand what the term “fair market value” means? A. Certainly.

Q. It means the point at which the mind of a willing buyer would meet that of a willing seller, both of them being informed, and having a reasonable time to consummate the transaction? Is that the way you understand it?

A. That is right.

Q. How could it be sold? How could you sell it to a willing buyer with a clause in there providing that you couldn't unless you got the consent of the Defense Corporation and the Maritime Commission?

A. You are talking about something entirely different. I have given a value for my option based on the fact that this option was cancelled and terminated by condemnation. I have lost the rights. By condemning, you have taken these rights from me. And I valued these rights under an assumption I could have sold it and taken up my rights. I think that is pretty clear.

Q. But, under paragraph 24, do you think you could have sold?

A. Certainly. I could have sold with that written [496] consent but I wasn't planning to sell.

Q. You felt that you would be able to get a buyer because you could get the consent of the Defense Plant Corporation and the Maritime Commission to let you sell it to him? Did you feel you could get that consent?

A. Definitely.

The Court: We will take our recess until 2:00 o'clock, ladies and gentlemen. Remember the admonition heretofore given you.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.) [497]

San Diego, California, Thursday, February 20, 1947.

2:00 P. M.

(Thereupon the following proceedings were had between court and counsel at the bench, outside the hearing of the jury:)

The Court: Mr. Crouch wanted to speak to the court. I don't know what it is about.

Mr. Crouch: May we assume, your Honor, that there will be no session on Saturday?

The Court: Oh, I think so, this Saturday, but next Saturday, if we are still here, we will have a session.

Mr. Landrum: Your Honor, I would like to state with reference to your Honor's statement that this case controlled by the General Motors case that I wondered whether your Honor was familiar with the fact that that has been modified by the Pettimore case.

The Court: Oh, yes. I am entirely familiar with it.

Mr. John M. Martin: Also, your Honor please, we will try to have our requested instructions here before the end of this session.

Mr. Landrum: We will have ours this afternoon.

Mr. John M. Martin: Ours are being typed.

(Thereupon the proceedings were resumed within the hearing of the jury:)

The Court: The question counsel asked of the court was [498] whether we would have a session of court on next Saturday. Ordinarily we would, but Saturday hap-

pens to be Washington's Birthday, and I know one of the jurors and perhaps more of you, have made some arrangements to take a little recreation on that day. So we will not have a session on next Saturday but if this case prolongs itself into next Saturday, the week following, we will have a session on that day.

Proceed, gentlemen.

CARLOS TAVARES,

called as a witness by and on behalf of the Defendant Concrete Ship Constructors, having been previously sworn, was examined and testified further as follows:

Cross Examination (Continued)

By Mr. Landrum:

Q. Mr. Tavares, in order that I may clear my mind up with relation to your line of reasoning, is it your opinion that this shipyard, in the condition that it was in on December 23, 1944, after having been used for some two years in the construction of ships for the government, would have sold for \$750,000 more than it cost the government under wartime conditions?

A. I didn't say the shipyard. I said my leasehold.

Q. Yes. Well, now, that is the reason I ask, how much of your figure, of the cost of this shipyard to you, did you include for what you say is your right of possession, [499] your right to have that lease?

A. I did not break that down.

Q. You did not break it down?

A. I took it as a whole.

Mr. Landrum: I guess that is all. [500]

(Testimony of Carlos Tavares)

Redirect Examination

By Mr. John M. Martin:

Q. Mr. Tavares, did you take into consideration the fact that, at any time the lessee was not in default under the terms of his lease, he could, by the service of a 10-day notice of his intention to terminate the lease, that he then had the right for 90 days after such termination to elect to purchase under paragraph 15 of the lease?

A. Yes, sir.

Mr. Martin: That is all.

Mr. Landrum: That is all.

Mr. John M. Martin: We will call Mr. Seabrook.

R. S. SEABROOK

called as a witness by and on behalf of the defendants Tavares Construction Company, et al., having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: R. S. Seabrook.

Direct Examination

By Mr. John M. Martin:

Q. State your name and residence.

A. R. S. Seabrook; San Diego, California.

Q. Are you a member of the co-partnership of Stroud and Seabrook, named as defendants herein?

A. That is correct. [501]

Q. Were Stroud and Seabrook members of the joint venture doing business under the firm name and style of the Concrete Ship Constructors? A. Yes, sir.

(Testimony of R. S. Seabrook)

Q. What was your connection with Concrete Ship Constructors personally during the period of its active operation?

A. I was one of the partners of the company.

Q. And to what extent were you familiar with actual construction operations from the time they first commenced construction, the facilities and machinery, to December 23, 1944?

A. I was there on the job during that period of time.

Q. What portion of your total time did you devote to being there on the job? A. 100 per cent.

Q. To what extent were you personally familiar, on December 23, 1944, with the condition of the facilities and machinery as they then existed?

A. I was there every day. I was familiar with the company.

Q. Had you had previous construction experience wherein you used various types of machinery and equipment?

A. Yes; I have had quite a little previous construction experience. [502]

Q. Over what period of years?

A. I started to work for my present partner Mr. Stroud about 1915, intermittently, and about 1919—I worked for him continuously up to about 1925, when I became a partner of the firm that is now named as Stroud-Seabrook. We were busily engaged in the manufacture of concrete pipe, the installation of irrigation systems and general construction work such as the construction of a portion of Lake Youngs Aqueduct for the City of Seattle, which we did in connection with Mr. Elliott; also the West Seattle Reservoir; 27 miles of the Los Angeles

(Testimony of R. S. Seabrook)

Metropolitan Water District Aqueduct, which embraced canals, 300,000 yards of concrete, and many millions of yards of excavation, circular siphons, the installation of reinforced concrete, fabrication of steel and so forth and, during 1941, I became associated with Mr. Tavares in the construction of these facilities and the construction of ships and repair of ships during the last five years, during which time we received a certificate of achievement from the Navy for—

Mr. Landrum: Just a moment. If the court please, I don't think that is proper.

The Court: I don't know what it would be. Apparently, you know what it would be. I think he shouldn't go into details.

Mr. John M. Martin: I have no knowledge of it, your [503] Honor.

The Court: Eliminate that part of it.

Q. By Mr. John M. Martin: Just limit it to those experiences which you have had that will explain to the court and jury your qualifications to judge of the usability of these facilities and this machinery.

The Court: I haven't any idea what he had in mind but I will ask what was that certificate?

The Witness: That was awarded by the Secretary of the Navy for outstanding performance during the war.

The Court: I think he may state any such awards that he received.

The Witness: And, also, we received the Maritime M award for outstanding production in the construction of concrete ships, and were subsequently awarded two gold stars, each for six months' continued service. My con-

(Testimony of R. S. Seabrook)

struction experience has been general, being of all types of construction.

Q. By Mr. John M. Martin: Have you had experience during the period you mentioned in the estimating of costs of construction of various types? A. Yes.

Q. And has it been a part of your business to keep informed as to the costs of the various types of construction? A. Yes; it has. [504]

Q. Now, will you state to the court and jury, as you observed it, the condition of the facilities and machinery as they existed in this shipyard on December 23, 1944?

A. The facilities were in very good condition.

Q. Will you tell what you mean by "very good condition"? Had they been practically worn out as of that date?

A. We had a substantial maintenance crew in order to maintain the equipment constantly. There are some items of small equipment that, naturally, wear out. There might be some small items like concrete vibrators that might have been eliminated entirely but, generally speaking, the equipment was in very, very good condition.

Q. Have you participated in any way in the keeping of or calculating of costs that were incurred from time to time on this job?

A. I didn't personally keep account of costs. We had a department for that purpose. [505]

Q. Was your familiarity with the condition of the shipyard and the facilities and machinery as of December 23, 1944, such as to enable you to form an opinion as to the fair market value as of that date of the facilities and

(Testimony of R. S. Seabrook)

machinery as they existed on that date? That is a question you can answer "Yes" or "No," Mr. Seabrook.

A. Yes.

Q. Will you state in dollars your opinion of such value.

Mr. Landrum: If your Honor please, I am going to ask your Honor whether I may have the same general objection to each of these questions as put to this witness as I heretofore made? Or, I will be glad to repeat it.

The Court: It is not necessary to repeat it, unless you desire.

Mr. Landrum: No, sir. May I then have the same genral objection that I have heretofore recited to testimony with relation to value as to this witness?

The Court: It may be so understood, and the same ruling.

Mr. Landrum: Yes, sir. And an exception to your Honor's ruling?

The Court: So ordered.

The Witness: Well, in my opinion, the fair market value as of December, 1944 was about \$2,650,000.

Q. By Mr. John M. Martin: Will you state upon what you base [506] that opinion?

A. Well, I base that on many things. I took into consideration the increase in land values between 1942 and 1944, the free use of the property up to the end of 1949, the privilege and right to negotiate for the purchase of the facilities and the site, the opportunity to purchase the facilities and site at a price offered by another prospective purchaser, the privilege and right upon termination of the agreement of lease by either party to purchase the site and facilities, the right to possess the site and facilities by a

(Testimony of R. S. Seabrook)

fee simple title, which automatically permitted us to mortgage or bond or hypothecate the property. Also, I took into consideration the fact that we were entitled to a fee for the construction of the facilities, and also for the engineering of them.

Q. I hand you, Mr. Seabrook, Plaintiff's Exhibit 3, which has been received in evidence, which purports to be a letter dated November 24, 1944, and signed by you. Will you state whether that bears your signature?

A. It does.

Q. Did you personally write that letter?

A. I did.

Q. Will you state how you arrived at the three per cent therein stated for an engineering fee or supervisory fee? [507]

A. Well, that three per cent, amounting to approximately 80,000, was one item which I thought we were entitled to, together with the other items which are enumerated in this letter.

Q. Was that letter ever answered?

A. No, this letter was never answered.

Q. Either in writing or orally?

A. No, this letter was the result of discussions which I had with Captain Conger to the end that we might negotiate a settlement of our controversy, if you might want to call it that.

Q. Had you been informed by Captain Conger of the extent to which the improvements were then contemplated by the Navy?

A. I had not been informed of that by Captain Conger, but—

(Testimony of R. S. Seabrook)

Mr. Landrum: Just a moment. If the court please, that is objected to, first, upon the ground and for the reason he said he had not, he has answered "No" and, second, whatever improvements the Navy have made after the taking is not material.

The Court: I think he has already answered.

Mr. John M. Martin: It is not offered for that purpose, your Honor.

The Court: I think he has answered the question. [508]

Mr. John M. Martin: Yes, I think he has.

Q. By Mr. John M. Martin: At the time you wrote that letter, were you giving consideration to the value to your company that might result, in dollars and cents, were that proposal accepted by the government?

A. Yes. I had—

Q. Just a minute. Now, will you state your opinion at the time you wrote that letter, as to what the fair value, in dollars and cents, in benefit to your company would be in the event that proposal were accepted by the government and the rights therein proposed been granted by the government to you?

Mr. Landrum: Now, just a moment. That is objected to upon the ground and for the reason that it opens up the door to all these transactions that have taken place since December 23, 1944.

Mr. John M. Martin: If the court please, I am not going into any subsequent transactions.

Mr. Landrum: Well, he has asked the question as to what it would have meant to the company in dollars and cents to carry on after December 23, 1944.

(Testimony of R. S. Seabrook)

The Court: I understood him to say "at the date of the writing of the letter."

Mr. John M. Martin: Correct.

The Court: Read the question, please. [509]

(The question was read.)

The Court: Objection overruled.

The Witness: About six or seven hundred thousand dollars.

Q. By Mr. John M. Martin: Upon what do you base that figure?

Mr. Landrum: Now, if your Honor please, may I have that same objection to that question and all the further line of questions going to show that they would have received six or seven hundred thousand dollars for the things that that letter says they wanted the right to do after this taking?

Mr. John M. Martin: It is not offered for the purpose of showing they would have received it. It is offered for the purpose of showing what value the witness placed upon the proposal, if accepted.

Mr. Landrum: May we come up to the bench, your Honor?

The Court: Yes.

(The following proceedings were had between the court, Mr. Landrum and Mr. John M. Martin, outside the hearing of the jury:)

Mr. Landrum: As I understand the question which counsel has asked, it was this: What value, in dollars and cents, did this witness place upon paragraphs 1, 2 and 3 of that letter, in dollars and cents in addition to the \$80,000? [510]

Now, paragraph 1 of that letter provides they shall have further contracts for the construction, and that they shall be able to complete the contracts for boats for the Navy. Second, they shall have some other government work to do. Third, that they shall be awarded the contract for the reconstruction of this yard for the Navy Department.

Now, if your Honor please, if he has opened the door, as I feel he has, then I should be permitted to show that each and every one of those clauses have been complied with by the government of the United States. In other words, the situation is this: They got everything that those other clauses provide, which he was asking for. He did continue to make ships, he did continue to occupy the yard, and in addition to that, he was asked to bid on the reconstruction of this yard by the Navy Department. The government carried out those other provisions.

Mr. John M. Martin: If the court please, if there was a possibility of counsel being able to produce proof of that, it would be different. Counsel has introduced one step in the form of the negotiations or in the progress of the negotiations by the introduction of Exhibit 3. He has apparently offered it, and the court has so accepted it, on the theory that it is an admission against interest on behalf of my client. I propose to show it is not an admission against interest and that the rights set forth would have exceeded in [511] value the amounts they have testified to as to the value of the whole leasehold.

Mr. Landrum: The truth of the matter is, and this witness will so admit, that paragraph 1 was complied with by the government, that he got every right set forth there; that he had every right, and in addition to that that he was working for the—

Mr. John M. Martin: I dispute that, your Honor.

The Court: That is not any reason why the court should exclude the matter from the jury's consideration.

Mr. Landrum: What I am trying to say, your Honor, that if counsel is permitted to show that if the terms and conditions of that exhibit had been carried out they would have been able to make six or seven hundred thousand dollars, that that is what it meant to them, then I should be permitted to show they made that money after December 23, 1944.

Mr. John M. Martin: In order to show that, you will have to show it was after the lease had ceased to exist. We contend they did that work under independent contracts, under various departmental heads, and those contracts are not in issue in this case and are subject to administrative accounting and settlement, and that settlement has not been made.

The Court: You injected that phase into the case, did you not?

Mr. John M. Martin: No. [512]

Mr. Landrum: That is my position.

Mr. Martin: I am only showing that when he offers the letter as an admission against interest, in truth and in fact it is not an admission against interest.

The Court: But isn't the result of that, necessarily, to bring in matters that occurred subsequent to this, and if they do that, you are going to be prejudiced in the Court of Claims. [513]

Mr. John M. Martin: I proposed to make it as a deadline, December 23rd, but I feel that I have a right to refute that as an admission against interest.

The Court: You may have that, but I am telling you now that if you open the door to events that occurred

subsequent to the date of the taking, and there is a verdict that is not satisfactory, you may be prejudicing yourself.

Mr. John M. Martin: I am not going to open the door.

Mr. Landrum: You have got it open now.

Mr. John M. Martin: I am simply trying to show by this witness, and I make an offer to show, by this witness at this time, that at the date he wrote the letter it was his information that there was approximately \$12,000,000 worth of Navy work to be performed.

Mr. Landrum: Later.

Mr. John M. Martin: And that under the terms of the letter, had it been accepted, he would have been in a position to make the competitive bidding for that work, and have had the free use of these facilities. I expect to show by him that what he meant by "free use," is that he didn't mean simply free rent, but he meant free use, free from any insurance, taxes, maintenance, watchmen, and any of the items of expense which were to have been normally carried by the terms of the lease under Plancor 407. I want the witness to explain what he meant by the term "free use," and it was [514] in the letter, and the very valuable rights that had been granted, under which he fixed a minimum supervisory fee of three per cent.

I offer to show that for the purpose of showing the letter, in fact, is not an admission against interest. In so doing, counsel is not asking that the jury consider or that the court consider any event which has occurred subsequent to December 23, 1944.

Mr. Landrum: Counsel has gone still further. He says he proposes to show they would not have to pay for

taxes, for watchmen, and so forth. I have the absolute figures to show where they did pay for them, and they asked the Navy—

Mr. John M. Martin: That is true, if your Honor please, that is under administrative contracts voluntarily entered into between my client and the Navy long subsequent to the time when this contract ceased to exist and they are subject to administrative settlement. There are substantial amounts that changed hands and substantial work subsequent to December 23, 1944, and I do not intend to go into those contracts or to go into the work performed subsequent to December 23, 1944. This is only for the purpose of showing that what counsel says is an admission against interest is, in truth, not such.

Mr. Landrum: May the record, if the court please, show [515] that the exhibit which is in evidence here as Plaintiff's Exhibit 3 is offered by the government of the United States, the plaintiff herein, solely for the purpose of showing that by virtue of that letter an admission was made by the defendants that three per cent or \$80,000 was a minimum fee for their supervision, and for no other purpose whatsoever.

Mr. John M. Martin: I am willing to stipulate it may be received in evidence for that purpose, provided I be permitted to show the manner in which the three per cent was arrived at, by taking into consideration the other very valuable rights therein afforded.

The Court: I do not believe that we should get into an exploration of events that were purely prospective at the time the letter was written.

Mr. John M. Martin: That is right.

The Court: That is what you would be doing, if permitted to open the door, as you say you would like to.

Mr. John M. Martin: No, I don't care to go into it. I only care to go in as far as the three per cent is concerned, on the basis of showing it involved other valuable rights in addition to the three per cent, to show they had a value that they measured, as against the contention that this might be construed as an admission against interest by my client.

The Court: But what the other side will say is, "We [516] want to explore those, to see whether or not they are actually existent." Then don't you get into these other phases of the case?

Mr. John M. Martin: I think I would be entitled to show that those rights, had they been granted, would have had a fair value. That is the extent of our explanation, because he has offered that for the limited purpose of showing it is an admission against interest. I want to prove that, in fact, is not an admission against interest.

The Court: Probably it would be within the realm of proof if you asked him to explain it without going into detail. The other side, however, may not be satisfied with that and will want to go into the door which you open.

Mr. Landrum: If my recollection is correct, I started to ask those questions, the very things he is asking now. I started to take up item 1 and counsel objected to it.

Mr. John M. Martin: I objected to his asking if he received such a right, because he received it subject to departmental agreement subsequent to the time the contract ceased to exist. It was a right received by free voluntary contract subsequent to the date when the lease ceased to exist. It was a right received by free voluntary contract subsequent to the date when the lease ceased to exist, and that is not a matter we can go into in this case.

If the witness is permitted to testify as to the value that he placed on the rights that would have been accorded, that is all I ask to prove by him. [517]

Mr. Landrum: Am I not to be permitted to show he got the rights?

Mr. John M. Martin: If you can show he got them under the terms of the lease, I will make no objection, but if subsequent to it, under other contracts, after the lease had been terminated—

The Court: I do not want to anticipate what will be offered by either one of you, but I am stating that if you do go into this matter, I am not going to foreclose the government from exploring it.

Mr. John M. Martin: Well, I do not want to take the time. I feel that is, in effect, a collateral issue.

The Court: I think you are injuring your own clients' rights by doing that because you will get a record here that would be embarrassing to you in other forums.

Mr. John M. Martin: It would muddy the clear line of demarcation on which we have tried to try the case, and for that reason I shall not pursue the question.

The Court: Very well.

(Thereupon the proceedings were resumed within the hearing of the jury:) [518]

(Thereupon, in the presence of the jury, the following proceedings were had:)

The Court: Proceed.

Q. By Mr. John M. Martin: Will you explain what you mean by free use? Did you mean free rental or what did you mean?

(Testimony of R. S. Seabrook)

(Whispered conversation between Mr. Martin and Mr. Landrum.)

Mr. John M. Martin: If counsel objects, I will withdraw the question. You may cross examine.

Cross Examination

By Mr. Landrum:

Q. Just one question or two, Mr. Seabrook, please. You have given us as your opinion the fair market value of the facilities, as of December 23, 1944, as \$2,650,000?

A. Yes, sir.

Q. How much of that was land values?

A. For the land itself?

Q. Yes, sir.

A. There is no figure in there for the land itself.

Mr. Landrum: Could I have that exhibit there, if your Honor please?

Q. Here is the thing that is concerning me, Mr. Seabrook. In this exhibit, which we have prepared for the use of the jury, which goes to the question of the depreci-
[519] ated cost of what we term to be the facilities, there is quite a bit of money that is in that for reconditioning this land, isn't there? All the dredging and everything is in here, isn't it?

A. That is true.

Q. Did you include that in your figure here that you have given us? That is what I am thinking about, sir. You gave us a figure of \$2,650,000 as, in your opinion, the fair market value of these facilities?

A. That is right.

(Testimony of R. S. Seabrook)

Q. Are you including in that the land in its improved condition, including the money that was spent to make that land what it was?

A. I am not including the cost of the site.

Q. Do you know how much money there is included in this Exhibit Q for the dredging and the actual change in the physical condition of that land? A. Yes.

Q. Tell us how much it is.

A. Two million six—

Q. No. I meant the amount that is in this exhibit here.

A. I don't know what exhibit that is.

Q. Do you know the one we made up for the jury, which shows the depreciated value of these facilities? [520]

The Court: Show it to me.

Q. By Mr. Landrum: What I would like to know, if you know, is how much of that is for dredging and all the work that was done on that land.

A. We have a total over here.

Q. What is the total? A. \$2,657,067.

Q. Now, let me call your attention to page 3, 11(a), 2113, of the wet dock, \$148,000. That is something that is right there in the land, isn't it?

A. Yes; that is for a dock, covering a dock.

Q. They have got another dock, No. 3—

The Court: That is No. 2.

Mr. Landrum: Yes; No. 2.

Q. \$218,000, and here is another one, \$230,000?

A. Right.

(Testimony of R. S. Seabrook)

Q. That is something that was put in there by the Defense Plant Corporation and is actually a part of the physical land and water, isn't it?

A. It is a part of the land; yes; a hole in the land.

Q. Now, are you including that in your answer—I beg your pardon. What did you say?

A. I said that is a depression in the land.

Q. Are you including that in your figure of \$2,650,000 as the fair market value of what we call facilities or not?

A. Yes.

Mr. Seabrook, have you any way of telling us how much is included in this Exhibit Q for light and power?

A. This one here?

Q. Yes, sir.

A. No; I don't know just how much this exhibit includes for light and power.

Q. Could I have that exhibit? I won't take any more time going over that. You said that you had taken into consideration free use of the property to 1949. By that did you mean that you would have the free use of the property so long as you were building boats for the government?

A. That is true; we would.

Q. And you would not have it unless you were building boats for the government?

A. Unless we were doing governmental work.

Q. If you didn't have government contracts, you wouldn't have the free use of that property, would you, under that agreement?

A. That is true.

(Testimony of R. S. Seabrook)

Q. And you said that you took into consideration and added something for your right to negotiate the purchase. What do you mean by that please, sir?

A. Well, I think it is worth something to be able to [522] sit down with a man, across the table from him, and look him in the eye, and negotiate for a piece of property or an automobile or anything else, especially in view of the fact that you have an opportunity to purchase it at the highest bid that anybody else would see fit to offer on that property.

Q. Don't we all have the right to sit down and negotiate with our neighbor or the owner of the property to purchase his property from him?

A. You don't always have the opportunity to sit down and negotiate with the government.

Q. You have added how much money because you had this right to sit down and negotiate with the government?

A. I didn't put a specific amount down for that purpose.

Q. And then you added to your figure something because you say you were entitled to a fee for the construction of the facilities, did you not?

A. That is true.

Q. How much did you put in or add for your fee for the construction of the facilities?

A. About 10 per cent.

(Testimony of R. S. Seabrook)

Q. In this letter here that you wrote you said that 3 per cent would be a minimum fee, did you not?

A. Yes; but that was just a part of the consideration under that letter. [523]

Q. Now, Mr. Seabrook, just one further question. Is it your opinion that a buyer, willing but not compelled to buy, in his negotiations with a seller, willing but not compelled to sell this land, would be willing to pay him anything as his fee for having constructed a shipyard for himself to build ships in?

A. Why, that is a figure that anybody would normally have to pay. It is added to the cost.

Q. Yes, sir, but now we are thinking about market value. You understand that market value is the price that would be arrived at between a buyer willing but not compelled to buy and a seller willing but not compelled to sell, both being informed, and given a reasonable time to consummate the deal?

A. Yes, sir.

Q. Now, from the standpoint of that buyer, do you think he would be willing to give you anything as your fee for having constructed a shipyard in which you, yourself, built ships?

A. I certainly think he would if he knew that there wasn't any fee included in the other price.

Mr. Landrum: Thank you, sir.

Mr. John M. Martin: That is all.

Mr. Crouch: We will call Mr. Hotchkiss, please. [524]

H. G. HOTCHKISS,

recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Mr. Crouch: I wonder if government counsel would be kind enough to slide down one chair while I am examining this witness, so I can face the witness.

Mr. Landrum: I will be glad to; yes, sir.

The Court: Mr. Hotchkiss, you were sworn before on another aspect of the case, were you not?

The Witness: Yes; I was, your Honor.

The Court: I apprehend that, the jury having heard Mr. Hotchkiss before as to his qualifications, it won't be necessary to review those unless you desire to enlarge the record unnecessarily.

Mr. Crouch: No, your Honor.

Mr. Landrum: If the court please, the government is perfectly willing to stipulate Mr. Hotchkiss' general qualifications. I do not know, however, what the questions will eventually be. I feel he might need some special qualification if he is going to value an entire shipyard.

By Mr. Crouch:

Q. Mr. Hotchkiss, you were employed by the Concrete Ship Constructors along in October of last year, were you not? A. Yes, sir. [525]

Q. And I think you told to the jury, and the jury probably remembers most of it, what you did as to your employment, in order that you might testify in this case. When you were on the stand before you were testifying in behalf of the defendant City of National City?

A. Yes, sir.

(Testimony of H. G. Hotchkiss)

Q. They employed you a few days before the trial, did they not? A. Yes, sir.

Q. And there are some matters in connection with the condemnation of the rights of the Concrete Ship Constructors that the City of National City is not interested in but that we are. A. Yes.

Q. Were there some further studies or investigations which you made in order to prepare yourself to appraise the value of the leasehold interest of the Concrete Ship Constructors, which you did not tell us about when you were on the stand the other day?

A. Yes, sir; there were some other investigations that I made.

Q. What investigations did you make, with particular reference to the value of the leasehold rights of the Ship Company?

A. Well, I went over, with the officers of the Concrete [526] Ship Company, the contract entered into by them with the Defense Plant Corporation in December, 1941, and familiarized myself with the different sections of that contract and, also, made an inspection of the property and the yard as it is today.

Q. Do you have a copy of the contract before you?

A. Yes, sir.

Q. You will note that the original lease from the City of National City was obtained by the Tavares Construction Company, who assigned the lease to the Defense Plant Corporation at the time of the making of this contract. A. Yes, sir.

Q. Then, the Defense Plant Corporation assigned it back to the Tavares Construction Company?

A. Yes, sir.

(Testimony of H. G. Hotchkiss)

Q. I want to call your attention now to one or two things that are in this contract particularly because counsel for the government has referred to them in his questioning of certain other witnesses.

Mr. Landrum: If the court please, the question is objected to or the statement is objected to on the ground it is argumentative.

The Court: It does no harm. It may remain. Overruled.

Q. By Mr. Crouch: Will you turn, Mr. Hotchkiss, and [527] possibly the jury might want to follow me, to paragraph 12 of this contract? A. Yes, sir.

Q. Pretty well up in the commencement of the paragraph it refers to the fact that "The Defense Plant Corporation hereby agrees to sublease the site and to lease the facilities and machinery to be acquired, and does hereby sublease the site and leases the facilities and machinery to be acquired hereunder to lessee—" Who is the lessee?

A. The Concrete Ship.

Q. —"for a term ending December 31, 1947, which term, upon its expiration, shall be automatically extended for an additional period ending December 31, 1949."

What do you understand the word "automatically" to mean there?

A. I understand that that means that the lease is extended until 1949, without further negotiations, on the same terms and conditions.

Q. Then I read you this language, "This lease or any extension thereof under this paragraph 12 may be terminated by the parties hereto in the manner hereinafter

(Testimony of H. G. Hotchkiss)

set forth.” Do you in your business frequently have occasions where either party can terminate a lease?

A. It is rather unusual.

Q. Yes. Usually in leases who only can do the ter-
[528] minating?

A. Usually the lessor, if there is a violation of the terms of the lease.

Q. And in this case the lessor was the Defense Plant Corporation or the United States Government?

A. That is right.

Q. So that is it your view that this was a rather unusual lease?

A. That is an unusual clause; yes, sir.

Q. As a real estate expert, can you imagine why such a clause would be contained in this particular lease?

Mr. Landrum: If your Honor please, we object to the form of the question.

The Court: Yes; I think so. We have great respect for the witness but I don't think his imagination will help us any.

Q. By Mr. Crouch: Then, after the language that I read you, that this lease or any extension thereof under this paragraph 12 may be terminated by the parties hereto in the manner hereinafter set forth, the lease proceeds to provide for the manner in which it may be terminated, doesn't it?

A. Yes, sir.

Q. And does it provide a criterion or prescribe a set of conditions under which the Tavares Construction Company could have terminated it at any time? [529]

A. Yes, sir.

(Testimony of H. G. Hotchkiss)

Q. If so, when?

A. They could terminate it at any time by giving a certain notice.

Q. That is, any time when the site was no longer needed by the government for the construction of boats? Is that not true?

A. Or a substantial portion of the site.

Q. At any time when substantial use by lessee, that is, the Ship Company, of the site, facilities and machinery, shall be no longer required to enable lessee, the Ship Company, to construct boats for the government, the Defense Plant Corporation can terminate it, can't it?

A. Yes, sir.

Q. Now, let's see when the Ship Company can terminate it. "The Defense Plant Corporation may, with the written approval of the Maritime Commission, give written notice to lessee that substantial use is no longer required and that Defense Plant Corporation, therefore, proposes the termination of the lease or extension; and the lessee—" that is, the Ship Company—"may give similar written notice to Defense Corporation and to the Maritime Commission stating that lessee, therefore, proposes the termination of this lease or an extension thereof"? A. Yes, sir. [530]

Q. Will you turn over to paragraph 15? Tell the jury, in ordinary non-legal language, what the paragraph means.

A. This paragraph provides that, upon the expiration or termination of this lease or any extension thereof, according to paragraph 12, it is cancelled and that the lessee has 90 days after the termination or cancellation, the option and the right to purchase all, and the language says,

(Testimony of H. G. Hotchkiss)

“but not part of the site and facilities,” under certain terms and conditions. It also provides that they have the right to negotiate after the formula set out for a part of the site.

Q. I understood—and perhaps you were in court this morning—

A. Yes, sir.

Q. —when counsel for the government was cross examining a witness, that he got from the witness an admission that, on December 23, 1944, which was the date of condemnation, they didn't need the plant any more for the construction of government ships; that they had them about all constructed except two.

A. Under the present contract.

Q. Then, if that were so, the day before this condemnation case was filed, the Tavares Construction Company could have bought the plant and site, couldn't they?

A. They could have under that clause; yes, sir.

Q. You understand that when a city or the State or an [531] irrigation district or even the United States government wants to take anything from anybody, they have got to pay what it is worth, don't they?

A. That is my understanding; yes, sir.

Q. In fact, that is a constitutional guarantee of rights in this land of ours, isn't it?

A. Yes, sir.

Q. And you have been placed on the stand by us to tell this jury your opinion of what the rights were worth that the government is taking away from the Concrete Ship plant. Have you tried to figure it out?

A. Yes, sir.

Q. What in your opinion is the fair and reasonable market value of the leasehold rights of this shipyard plant, machinery, tools and equipment, on the 23rd day of

(Testimony of H. G. Hotchkiss)

December, 1944, at the time the government took them away from them?

Mr. Landrum: If your Honor please, may I have the same general objection that I made to that question as to the other witnesses, on value?

The Court: You are not including in the objection the fact that the witness has not had placed before him a true definition of market value?

Mr. Landrum: No; I am not raising that point, your Honor.

The Court: The same ruling is made. [532]

Mr. Landrum: And may the record show an exception, your Honor?

The Court: So ordered.

The Witness: Do you mean the lease contract, Mr. Crouch?

Q. By Mr. Crouch: The leasehold rights.

A. \$600,000.

Q. Now, tell the jury the reasons why you think that those rights were worth \$600,000 as to all of them.

A. I took into consideration the facts that we have been discussing here. I took into consideration that this contract that was entered into by the Defense Plant Corporation with this Concrete Ship carried several rights with it, the right to build ships for the government during the war and the right, as we have been discussing it, that, in the event the contract was cancelled by either party, the Concrete Ship would have the right to purchase it under certain terms and conditions, not only the land that was in this contract originally but also the land that was taken under this condemnation proceeding. And I took into consideration that the Concrete Ship, in exer-

(Testimony of H. G. Hotchkiss)

cising some of its rights thereunder, would have the right to own in fee simple, if an option was exercised in the contract, a piece of property that bordered on the Bay of San Diego, on the tidelands of National City, which would be a right that no other individual [533] could have or has had in this community or on this Coast that I have been able to find. I took into consideration the fact that, if this option was exercised, this property would have great advantage over other similar properties on tidelands, inasmuch as it could be hypothecated for financing additional improvements. And I also took into consideration that paragraph 15 of the contract gave the Concrete Ship the right, in the event their 90-day period expired and they did not purchase the property in the 90-day period, they had the right to look over the other fellow's shoulder and put in a bid at the same price that anybody else might make, and that was, in my opinion, quite an advantage in the acquisition of this property provided the contract or the option was not exercised. I took into consideration the right that this contract carried with for it free rent after certain conditions were complied with. I also took into consideration the very increased cost of material and equipment from the time this contract was signed until the condemnation proceedings were filed in December of 1944. I took into consideration the further rapid growth of this community from 1942 until 1944. I took into consideration that great increase in population and the transition of this community, National City, together with San Diego and Chula Vista, from a small town to quite a large city. Those are, Mr. Crouch, some of the conditions that I took into consideration in placing that [534] value on the lease contract.

(Testimony of H. G. Hotchkiss)

Q. As an appraiser, I want you to give thought to this question— A. Pardon me?

Q. As an appraiser, I want you to give a little thought to this question. Something was said this morning by counsel for the government about having no right to take into consideration anything that occurs in the future. Is it not a fact that all values of every nature are entirely predicated on what may happen in the future?

Mr. Landrum: If the court please, I agree with counsel in his statement, but I want to object to it, first, upon the ground it is a pure statement of fact; second, that it is argumentative and it doesn't go to the ruling of the court, as a matter of law, on that question at all.

Mr. Crouch: If you agree with me, I take it you won't in your argument to the jury talk about the future any more.

Q. In other words, if there were no tomorrow, this court house wouldn't be worth 10 cents, would it?

A. I agree to that, Mr. Crouch.

Q. There is another thing I want to ask you if you took into consideration. I notice that the legislature of California, in 1917, made the first grant to the City of National City of the tidelands, of which this site is a part, and it recites a number of whereases. "Whereas, since the ad-[535] mission of California into the Union, all tidelands along the navigable waters of this State and all lands lying beneath the navigable waters of the State have been and now are held in trust by the State for the benefit of all of the inhabitants thereof, for the purpose of navigation, commerce and fisheries.

"And whereases—"

Mr. Landrum: If the court please, I don't like to interrupt but I don't understand the question of counsel here. They say that the fee title had been passed. I don't see where the materiality is.

The Court: I don't know what counsel has in mind or what he is leading up to.

Mr. Crouch: It is pretty hard for anybody to get what you have in your mind by the preamble. I don't mind telling the court what this leads up to.

The Court: Let's have it, Mr. Crouch.

Mr. Crouch: The court, however, might consider that my answer would not under the circumstances be a proper thing for the jury to hear at this time, and I don't want to digress and infringe on the courtesy that the court has extended to me.

The Court: There is a later act than that, is there not?

Mr. Landrum: Yes.

Mr. Crouch: The later acts carried forward some of the [536] provisions that were in the prior acts; for instance, the last act of 1925 only amends certain sections, leaving certain other sections of the 1923 act which are still the law.

The Court: I didn't think there was any question here but what the fee title vested in the City of National City.

Mr. Crouch: Not in the slightest.

The Court: What other question is there involved in our case?

Mr. Crouch: There are fee titles, as the Supreme Court said in the Long Beach case—

The Court: Maybe I had better give the jury a recess now and hear what counsel has to say about it. Ladies and gentlemen, we will take a recess for a few minutes. Remember the admonition that I have heretofore

given you and keep it inviolate. Please occupy the jury room.

(The jury thereupon retired from the court room and the following proceedings were had outside the hearing and the presence of the jury.) [537]

Mr. Crouch: I will try to keep my voice up, your Honor.

The Court: Yes. I can hear you, Mr. Crouch. When the room is filled, it seems the acoustics are affected a little bit.

Mr. Crouch: There is no question but what the State of California held the fee title to these tidelands before the conveyance to the City of National City, nor is there any question that under the Act of 1917 the City of National City had a fee title. But there are fee titles, and there are fee titles.

Now, in the common acceptance of the words "fee title," as commonly used by real estate people and laymen, they mean the highest possible title under which a man may own real property. As pointed out in the Long Beach case very clearly, all you need to convey fee title is to have a grant of real property, but there may be a grant of real property and there may be a fee title to real property conveyed, but it may be conveyed under all sorts of restrictions that it is possible for the human mind to imagine. A trustee gets a fee title. A fee title may be conveyed subject to an outstanding lease for 99 years. A fee title may be conveyed with all sorts of reservations as to its use. A fee title might be conveyed to a residential block in Harlem, New York, which would provide that the property could only be inhabited by whites, in which event it would not have any [538] salable value

at all, because no white would live in the neighborhood. A fee title is conveyed, provided it can be isolated or sold as such to somebody, with certain peculiar qualifications that are pleasant to the grantor of the conveyance, and a fee title can be conveyed under a reservation which provides, as this National City reservation provides, that the grantee can never sell it himself.

Now, that is enough to show that there are all sorts of fee titles, with all sorts of values. An unrestricted fee title is the highest possible title that any person may hold real property under, where there are no easements, where there are no restrictions, and where there are no covenants against reconveyance. But when you come to consider the question of the value of a piece of real estate in fee title, subject to restrictions, you have to know what those restrictions are before you can value it, because the restrictions raise or lower the market, limit the demand to that particular class of the public which can make the particular use specified in the restriction.

So I want to show by this witness that he took into consideration the fact that if the tidelands were held by the City of National City under an Act which specifically provided that the City could never dispose of them, and provided that the City could only lease them for a limited number of years, and could cancel the leases, but that when [539] the government of the United States acquires that property, as they are doing in this law suit, and have made the State of California a defendant, and the State of California has conceded its rights and passed out of the picture, that so far as the State of California or the constitutional amendment we are talking about is concerned, it is out, and that if this property were to be acquired under this lease by the Tavares Construction Company, all of the reservations and restrictions that are

contained in the grant through the State are wiped out, and the Tavares Constructions Company holds this title in an unrestricted fee, where it can sell it, lease it, encumber it, and possibly do anything in the world with it, subject only to the unascertained and undecided question of whether or not at the time of the admission of California into the Union the Pueblos did not retain the ancient Spanish right to have the quarters within a pueblo devoted to commerce, navigation or fishery. So I want to show by this witness that in making his valuation he took those things into consideration.

The Court: I suppose he would testify as to what he took into consideration. However, we must have a standard that is applicable, and that is applicable in all condemnation cases. We can't have a variant that would apply in one proceeding in eminent domain, and not apply in others. There are certain features to this case which we have discussed at [540] the bench. You have not been present, I think, in all of those discussions, Mr. Crouch, but there are certain features that might constitute a detriment. I am not saying they do, or they do not, because this is not the forum in which to discuss those matters. The law has fixed a dead-line for the trial of this case, and the jury's function is going to be confined within that dead-line. That is the only way in which it can be safely tried, and it is the only way in which the rights of the litigants may not be prejudiced in this case. There may be remedies which some of the litigants desire to pursue further, after this case, and we desire, so far as we can possibly do so, and we have had the co-operation of counsel and I think all counsel have co-operated in trying to keep the case within that landmark, to chart the course of this case as a condemnation case, in which the government is seeking to acquire the res. The res is fixed,

its status is fixed so far as the government of the United States is concerned on a certain date. Anything that goes to fix the value of the leasehold that was taken at that time by the government is a proper subject-matter of inquiry, and in the ascertainment of that prospective situations that are reasonably certain, not purely imaginary or speculative or suppositious, and not the salesman's talk as to the future, not the Chamber of Commerce pronouncement or the real estate agent's picture, but the actualities that are reasonably [541] susceptible of accomplishment are proper. You may go to that extent in a case of this kind, but that is the limit. We cannot go into purely imaginative aspects. We haven't the power of divination and are not possessed of any occult powers that can discern. We simply must employ our finite faculties. That is all the jury can do and that is all citizens can do. The witnesses have to subject themselves to cross examination, of course. But the status of this property is fixed as of that time and there cannot be any uncertainty about that. If any damage or detriment may have ensued afterwards, this is not the place to litigate such matters. There is a court that is open to the litigants for the settlement of those questions. That is not a condemnation suit.

Have I given you the court's view?

Mr. Crouch: I agree with every word of the court's clear statement and subscribe to it fully. But that still does not eliminate, in my humble opinion, this fact. I am not attempting to show by this witness what will happen to this property after the condemnation. I am asking this witness to value this leasehold as it existed just before the condemnation suit was filed, with the rights contained in the leasehold, and among those rights, set forth and contained in the leasehold, was the right to purchase.

(Testimony of H. G. Hotchkiss)

Then if that is true, why is it not proper for this [542] witness or us to tell the court and the jury what he got, whether or not if the option was to be exercised pursuant to the lease, he would get a higher title than the City of National City had.

The Court: Of course, there is one thing that none of them could get, and that is the right of the people to the fisheries. It does not exist in the government at all. It is a right which the people have. I do not think we will discuss it academically any further, because I think it is clear as to what rights are concerned. You can propound your question, and if the government desires to object to it, we can rule on it. But there are certain rights that even the sovereign does not get in this country. They belong to the people and not to the government.

We will take a recess at this time.

(A short recess was taken.)

(Thereupon the proceedings were resumed within the presence and hearing of the jury:)

The Court: All present. Proceed.

Q. By Mr. Crouch: In arriving, Mr. Hotchkiss, at your figure of—I can't remember it, and I don't know how we can then expect the jury to,—how much was it?

A. 600,000.

Q. 600,000? A. Yes. [543]

Q. —did you take into consideration the fact that should the Tavares Construction Company acquire the plant pursuant to the leasehold, that it would acquire a fee title in the site? A. Yes, sir.

(Testimony of H. G. Hotchkiss)

Q. Will you refer, Mr. Hotchkiss, to the latter part of paragraph 15 of the lease contract?

A. Yes, sir, I have it.

Q. From your knowledge as a real estate expert, tell the jury in simple language what the government agrees to in that paragraph with regard to selling it.

A. Well, they give the lessee here a right to purchase under certain conditions. A condition was that after cancellation they had 90 days to buy it on this formula that was set out, together with the land, at what the land cost the government. If they didn't exercise their right to purchase, they had a further right to make any bid and purchase the property, providing the government put it up for sale and some other bidder made a bid, they had a right to come in and make that same bid and take the property. In other words, they could look at everybody's bid and purchase on those terms.

The Court: In other words, there would be no competition?

The Witness: No competition. [544]

The Court: They had a preferential right?

The Witness: A preferential right, yes, sir.

Q. By Mr. Crouch: Now, I notice that that option right is again referred to in one of the addenda contracts to this original contract. I refer to what is called amendatory No. 6, being an amended agreement made on the 11th of November, 1942, where they add a new paragraph which they numbered 31. Do you find it?

A. Amendatory No. 6?

Q. That is right. Oh, no, it is amendatory No. 5.

A. I thought you said 6. Pardon me.

(Testimony of H. G. Hotchkiss)

Q. I did, but I was in error. It is 5. "By adding thereto the following new paragraph Thirty-one,"—have you found it? A. Yes, sir.

Mr. Crouch: It is the fifth page from the last in the typed copies, so the jurors will understand.

Q. "By adding thereto the following new paragraph Thirty-one:

"Thirty-one: Lessee agrees that when Defense Corporation shall have acquired title to that part of the Site now being condemned by the Government, the Agreement of Lease,"—

then without taking the time to read the next several lines you will note a provision in there that if the Defense Plant Corporation should transfer [545] its rights to another branch of the government, pursuant to paragraph 26 thereof, prior to the acquisition by the Defense Corporation of title to that part of the site now being condemned by the government, lessee, that is, the Ship Company "will, if it should thereafter elect to exercise the option to purchase conferred by paragraph Fifteen of said agreement of lease, as amended, pay to the Government the cost," and so forth, on the same basis as they would if the Defense Plant Corporation had not transferred its rights. Do you understand that?

A. I don't think I followed you, Mr. Crouch.

Q. Well, as I interpret this clause, under paragraph 15 of the original contract it provides that the Defense Plant Corporation might have the right to assign all its interests to another branch of the government, like, we will say, the Navy and then, in order to protect the government they have this provision in this amendatory paragraph No. 5, that in the event the government, the De-

(Testimony of H. G. Hotchkiss)

fense Plant Corporation, should transfer its rights to another branch of the government, and in the event that the Tavares Construction Company should elect to exercise its option to purchase, that they would use the same basis for fixing the costs as had been in the prior agreement specified. Do you get it? A. Yes, sir.

Q. Then in arriving at your valuation, did you take [546] into consideration the fact that these option rights of the Concrete Ship Constructors to buy the land would not be terminated because the Defense Plant Corporation passed out of the picture and some other branch of the government took its place? A. Yes, sir.

Q. Now, you said that you took into consideration in making your evaluation that there would come a time, if this lease were not terminated, when the Ship Company would thereafter have the free use of the plant. That is a fact, is it not?

A. Yes, sir, I took that into consideration.

Q. Now, I call your attention to the last page of the last amendment, "When the total amount of rental—"

A. I haven't found it, Mr. Crouch, as yet.

Q. The last page of the last amendment.

A. That is amendment No. 6?

Q. Yes. That is about the middle of the page. Have you got it? A. How does it start?

Q. Right in the middle of the paragraph, "When the total amount of rental,"— A. I have it.

Q. "—which Lessee shall be required to pay hereunder shall equal the amount expended by Defense Corporation [547] under this agreement (including all direct expenses, without overhead, incurred by Defense Corporation in connection with the Site, Facilities and

(Testimony of H. G. Hotchkiss)

Machinery or in connection with this agreement) plus interest on each expenditure from the date thereof at the rate of Four per cent per annum less an amount equal to interest at Four per cent on each rental payment from the date of payment thereof, Lessee shall not be required to pay further rental."

How did that affect the value of this leasehold?

A. I took that into consideration as an advantage that anyone acquiring this plant would have in bidding on contracts over some other company or plant that might not have those same facilities. In other words, a rent of equipment and plant is a factor of cost, and if this corporation was in a position so that it did not have to consider the rent, and some other plant did, of course, it is obvious that they could make a better bid.

Q. Now, I believe you said that you took into consideration the increase in the prices of machinery, tools and equipment between November 10, 1942 and December 23, 1944, when the plant was taken away from them, a period of two years, one month and thirteen days. Tell the jury,—go into that a little bit more in detail and tell them what you know on that subject of what happened between those dates with reference to the construction industry, the availability [548] of materials and of labor, and the effectiveness of labor, as between those two dates.

A. Well, as an example, in the operation of the property that we operate, we operate office buildings and apartment houses, store buildings, where we are obliged ourselves to buy different kinds of equipment, machinery, compressors, elevator equipment, and things like that, and we found that from 1942 until 1944 things in our line had advanced approximately 20 per cent during that time,

(Testimony of H. G. Hotchkiss)

in the purchase of equipment. Real estate values during that time in some classes of property went up as much as eight and ten times. In other classes of property it doubled. In other classes of property it went up probably three or four times, depending, of course, upon the demand and the scarcity of that particular commodity, and in checking with other contractors—or, I mean contractors and not other contractors—but in checking with contractors the information I received from them was about that same percentage of increase.

Q. You have given us a general statement about the increase in the value of real properties, running all the way, I think you said, from double to ten, or whatever it was, times. What can you tell the jury about the increase in value of this particular type of tideland property between those two dates?

A. I would say that this particular property doubled [549] in value from 1942 until 1944, in December. I think that is conservative, that it doubled in value.

Q. Now, will you tell the jury what those two dates mean, why you pick them out?

Mr. Landrum: If the court please, that is a matter of law for this court.

The Court: The objection is sustained.

Q. By Mr. Crouch: As a matter of fact, Mr. Hotchkiss, from what you know of the conditions of availability of materials and labor in December of 1944, if anyone wanted to buy that concrete ship plant or wanted to buy a ship plant, and they couldn't come to satisfactory terms, could they have built such a plant at all?

A. In my opinion, they could not.

(Testimony of H. G. Hotchkiss)

Q. Well, is it your opinion as an appraiser than when anybody has a very useful thing, and nobody can duplicate it, that it is of greater value than if nobody else could make one like it?

Mr. Landrum: Just a moment. I object to that. It is argumentative, and the question answers itself.

Mr. Crouch: That is all right, then. I will not ask for the answer.

The Court: Apparently it is an obvious matter. You have to give the jury some consideration in using their intellectual processes in discerning obvious matters. [550] I don't believe we need witnesses to tell them that.

Mr. Crouch: In other words, the court thinks that I should assume I don't have to break the glass out of a window before the jury can see out.

Q. By Mr. Crouch: Now, when you were hired, Mr. Hotchkiss, were you given any other instructions by the Concrete Ship Constructors, or their attorneys,—

Mr. Landrum: That is objected to. It is immaterial what instructions they gave him.

The Court: Overruled.

The Witness: As to what?

Mr. Crouch: —than—and I think that will fit in where I left off—to make a very careful, thorough investigation of this plant, site, facilities, and all of the conditions surrounding it, which affected the value of that leasehold, and to appraise that leasehold at such an amount as, in your opinion, was its fair and reasonable worth and would sell for, if it could be sold.

A. Yes, sir, that is what they asked me.

Q. On the 12th day of December, 1923?

A. Yes, sir.

(Testimony of H. G. Hotchkiss)

The Court: You do not mean that date, Mr. Crouch?

Q. By Mr. Crouch: 1944. The 23rd day of December, 1944? A. 1944, yes. [551]

The Court: You got the "23" in the wrong place, I think.

Mr. Crouch: Yes. Now, Mr. Hotchkiss, I will turn you over to the tender mercies of the government's counsel. [552]

Cross Examination

By Mr. Landrum:

Q. Mr. Hotchkiss, it wouldn't have made much difference to you what they told you? That is what you would have done anyway? A. Yes, sir.

Q. They are not going to tell you what you would do so far as making an appraisal is concerned, are they?

A. No, sir.

Q. Mr. Hotchkiss, I want to ask you whether or not it is your opinion that the shipyard—and that is what you are valuing, isn't it?

A. I am valuing the contract.

Q. But, in order to do that, you have to arrive at a conclusion with relation to the fair market value of this entire yard and all the facilities, don't you?

A. That is one of the factors; yes, sir.

Q. Now, will you be good enough to tell this court and jury whether or not, in your opinion, a completed shipyard, doing business and operating and building concrete ships, would have sold for more money, on December 23, 1944, than that same shipyard would have sold for at the beginning of its operations on November 10, 1942?

A. I believe it would, sir.

(Testimony of H. G. Hotchkiss)

Q. In arriving at this conclusion, did you take into [553] consideration the fact that the Concrete Ship Constructors had practically completed their last contract with the government for the construction of ships?

A. I considered that, Mr. Landrum, and I also considered the fact that we were in war and no one knew exactly how long that war would last, nor did I know how many more contracts might be desired before that war was over.

Q. I just wanted to know if you thought that we were not a good deal more anxious to get these concrete ships and shipyards in 1942 than in January, 1945?

A. I couldn't tell. I didn't know how long that war would last. I was afraid it would last five years or more. It was only my opinion, of course.

Q. Now, what you are valuing here is a completed going shipyard, isn't it?

A. Ready to operate; yes, sir.

Q. Do you know about when all of this building of all these concrete barges actually stopped, dropped and quit?

A. I know practically when these contracts were expiring.

Q. Mr. Hotchkiss, in arriving at your conclusion with relation to the fair market value of this leasehold interest, of course, you had to arrive at that conclusion with relation to the fair market value of the land as separated from the facilities, did you not? [554]

A. That is one of the factors I took into consideration; yes.

Q. And under the contract, which we know here as Defendant's Exhibit W, I believe, Plancor 407, it is provided that the cost which would have to be paid under

(Testimony of H. G. Hotchkiss)

this subdivision (b) of the option clause would depend upon the amount of money that the government of the United States would have to pay for the acquisition of the land? A. That is correct, sir.

Q. In the figure which you have put in for this land value, you have used your own opinion of that, haven't you? A. That I had to do; yes, sir.

Q. Of course, if we had this jury's verdict, that would have fixed it for us, wouldn't it?

A. It would have made it much easier for me, sir.

Q. Let me ask you this. You had the exact figures as to what the government had to pay for some of these parcels, didn't you?

A. No; I didn't have that. I heard that they had settled with the Santa Fe but I didn't know what they had settled for.

Q. Parcel 4 must be included in your figures, must it not? A. Yes, sir.

Q. Parcel 10 must be included in your figures, must it [555] not? A. Yes, sir.

Q. Parcel 11 must be included in your figures, must it not?

A. Yes, sir; the batch plant. They were all included.

Q. And you have arrived at your figures by virtue of your opinion of what the government would have to pay for it? A. That is right, sir.

Q. In arriving at your opinion with relation to what the government would have to pay for those lands, you took into consideration the sales, did you?

A. There is no sale of tideland, Mr. Landrum. We had nothing to go by on that. But on 9 and 10 there have been sales.

(Testimony of H. G. Hotchkiss)

Q. Mr. Hotchkiss, we had the pleasure of asking you with relation to some sales here a day or two ago, didn't we?

A. Not me; no, sir.

Q. Didn't you give me a sale up there, wherein you said something about lots 1 to 8 in National City had been sold for a certain amount?

A. No, sir. You asked me if I had the corporation property in mind. Mr. Anewalt testified to it and I went and got it.

Q. Didn't you give from the witness stand the figure [556] at which you understood this land had been sold?

A. No, sir; I did not. Or, if I did, I have forgotten it.

Q. Let me ask you, are you familiar with that parcel of property there on which a sale was made, on the 10th day of March, 1942, by the San Diego, Arizona & Eastern Railway Company, to William Henry Stewart and Peter Bennett?

A. No, sir.

Q. Covering the property that you gave me the description of?

A. Only vaguely. I know that we sold it.

Q. You had it listed in your office?

A. It was sold by one of our salesmen.

Q. In 1942?

A. I believe so but I am not familiar enough with that sale to give you the details.

Q. Are you familiar with that property?

A. Vaguely; yes, sir.

Q. Were you familiar with it in 1944?

A. Yes, sir; I went and looked at it with one of our salesmen in 1944.

(Testimony of H. G. Hotchkiss)

Q. Were there buildings on it?

A. There was a building on it at the time I looked at it.

Q. What kind of buildings? [557]

A. It was a factory type building.

Q. That was a developed property and had a factory and buildings on it?

A. Yes, sir. Later it burned down.

Q. Did you consider that property, with that building on it and everything, or a number of buildings, to be qualified to compare or that it could be compared with this bare land?

A. It couldn't be.

Q. Now, I am going to ask you whether or not in arriving at your conclusion with relation to the fair market value of this property you took into consideration the amounts received as rental for leases of tidelands here in the city of San Diego.

A. I took that into consideration; yes, sir.

Q. All right. Now I want you to follow me on a lease or two here. We had the Harbor Master of the City of San Diego here to testify. Do you know him very well?

A. Yes, sir.

Q. They get out a list or a map of the leases which are made by the City of San Diego on these tidelands, do they not?

A. Yes, sir.

Q. And you had available to you such a map?

A. Yes, sir. [558]

Q. Have you got it now so that, if I give you a number, you can look up a lease?

A. No; I haven't it with me.

(Testimony of H. G. Hotchkiss)

Q. In arriving at your conclusion with relation to the fair market value of this property,—do you have any listings of leases in 1944?

A. Just a minute; I may have. No; I am sorry. I had that with me yesterday but I left it in my office.

Q. I won't proceed further with that at this time. You know, however, do you not, that, in 1944, there were at least a half a dozen or more leases made here by the City of San Diego on tidelands?

A. Yes, sir. Just a minute. In 1944?

Q. Yes, sir. We are talking about a 1944 valuation here.

A. In 1944, there were only six acres available, is the information I received from the Harbor Master.

Q. Have you got any list of leases there at all with you?

A. No. I just had the number of leases available. And, when I testified the other day, that was the number of acres available.

Q. Do you know the price at which those leases were made, in 1944, for the rental to be paid for the first five years of that term? [559]

A. As a part of the consideration of that lease, yes, sir; I know, in money. It started at—

Q. For the first five years—

Mr. Crouch: I don't think counsel should interrupt, if your Honor please.

Mr. Landrum: I am sorry.

Q. Isn't it a fact that on those leases, every one of them, made by the City of San Diego, in the year 1944, the rental for the first five years was one cent?

A. Plus.

(Testimony of H. G. Hotchkiss)

Q. Plus what? A. Plus other considerations.

Q. What other considerations?

A. The City, as I explained to the jury the other day, takes into consideration what a party will do with that land before they will lease it. In other words, you can't lease that land for one cent nor can I lease it for one cent, but, if we have a plant we expect to put there, and we expect to put taxable property on that land that will produce an income for the city and a payroll that will help the city and the merchants in the city, that is all taken into consideration on the start, and then it is a graduated lease on up.

Q. Do you know of any leases made by the City of San Diego on tidelands, in the year 1944, where the original rental at the start of that lease, for the first five-year [560] period, amounted to as much as three cents? A. When Mr. Brennan testified—

Q. I am asking you, sir.

A. I don't remember the exact date but Roscoe Hazzard, of the Hazzard Construction Company, rented a piece of tideland and paid six cents for it.

Q. To begin with?

A. To begin with. And the reason he paid six cents was because he wasn't putting anything on it but some automobiles.

Q. How long ago has that been?

A. It is within the last couple of years. You see, it depends altogether, Mr. Landrum, on what it is going to produce for the City. That was explained to me by the Harbor Master, who explained it to me at a time when I went to him to try to get leases from him. He wants to know what we are going to do with it.

(Testimony of H. G. Hotchkiss)

Q. Then, Mr. Hotchkiss, a comparison of the rental values in the City of San Diego with these rentals paid by these other corporations are not proper for comparison, are they?

A. It is pretty hard to put your finger on the amount of that money because, in one instance, like Consolidated, where they pay \$600,000 taxes, in comparison with Ryan, who pay probably half of it, it is an impossibility to put your finger on what that consideration is. [561]

Q. That is not what we call a free and open deal on the open market? There are other considerations entering into it?

A. It is the same situation with everybody except when they rent a piece of tideland.

Q. Now,—

Mr. Crouch: I object to counsel interrupting the witness before he has finished his answer.

The Court: I don't think he intentionally interrupted.

The Witness: I was through.

Q. By Mr. Landrum: I am concerned with your statement to the effect that under and by virtue of Exhibit W, which is Plancor 407, Concrete Ship Constructors or the Tavares Construction Company would have free rent after a certain period. Did you say that?

A. Yes; the contract provides it.

Q. But they would only have free rent providing they were building ships for the government, wouldn't they?

A. That is what the contract says.

Q. And, if they were going to engage in any private enterprise there, that contract provides they would have to obtain the consent of the Defense Corporation and the Maritime Commission?

A. Yes, sir. I understand they got that.

(Testimony of H. G. Hotchkiss)

Q. You understand they got that? [562]

A. I understand they got that consent at one time.

Q. And you understood they agreed to pay for it, too, didn't you?

A. I am not familiar enough with that detail to say.

Q. If they were on this shipyard, they would have to pay taxes, wouldn't they?

A. On the equipment.

Q. I beg your pardon?

A. On the equipment.

Q. Do you mean if they owned it?

A. No; under that lease.

Q. They would have to pay taxes?

A. On the equipment.

Q. And they would have to pay insurance, wouldn't they?

A. Yes, sir.

Q. And they would have to pay guards to guard the plant, wouldn't they?

A. Yes, sir.

Q. And, if they didn't have any contracts for the construction of ships, would it be a very profitable thing?

A. It would be profitable in making bids for additional contracts for ships.

Q. But suppose the government of the United States didn't see fit to give them any additional contracts, then where would they be? [563]

A. I think, if you can assume that, then the free rent wouldn't be so valuable.

Q. It would be a liability, wouldn't it, rather than an asset?

A. I wouldn't say it was a liability.

Q. In any event, it is true that, on the 23rd day of December, 1944, they only had one contract left and they only had two ships to build under that?

(Testimony of H. G. Hotchkiss)

A. I understand, as long as they had that contract and were not building ships, they could still operate the plant under the free rent, no matter what they did.

Q. Free rent for what?

A. Anything they wanted to do that was allowed by the Maritime Commission.

Q. But that contract provides that they could only use that plant for the construction of ships for the government, doesn't it?

A. Unless they got permission from the Maritime Commission. It doesn't show they had—

Q. I want you to break down your figures for me. You understand what I mean by that, don't you? In other words, let me ask you this. How much money, in your opinion, would the Tavares Construction Company have had to have paid for this shipyard had it exercised its option?

A. Well, I can't tell you that exact amount because I [564] don't know what they would have had to pay for the land.

Q. But can you give us any figure here if you don't assume something they would have to pay for the land?

A. I did assume what I thought the land was worth.

Q. How much would it have cost them?

A. I can't tell you that until I know when they would have exercised their option exactly. If you give those and you tell me the amount they were to pay and when they would exercise that option, that probably could be figured out. But I can't figure it out here now.

Q. Do you mean to say, if you can't tell us when they were going to exercise that option, that you are going to tell us what it was worth?

(Testimony of H. G. Hotchkiss)

A. I am giving the value that I felt that I could sell that contract for to a buyer who was interested in going into the ship business and having a plant ready to operate and ready to go into. In other words, he would have paid \$600,000 for it.

Q. Are you assuming that there is a possibility or a probability that they might have waited to exercise their option?

A. If the contract wasn't cancelled and they had contracts to repair ships and carry on their work, they might have done that.

Q. How much would they have gotten for it then? What [565] bonus could they have gotten if they had waited until 1949 to sell it?

A. In working out that formula, they would have paid that much less for the equipment. They would have paid the amount the formula called for. The longer they waited, the less the equipment would be.

Q. Do you have an opinion as to how much shipyards would sell for in 1949?

Mr. Crouch: That is objected to, your Honor, as not a proper question.

The Court: Overruled.

The Witness: I can't tell what they would have sold for in 1949. It depends altogether on conditions and how much work they might have.

Q. By Mr. Landrum: Mr. Hotchkiss, are you basing your answer in any manner on speculation or conjecture? A. No, sir.

Mr. Landrum: I guess that is all, your Honor.

The Court: We have a little more time. You might call another witness.

Mr. Crouch: We will call Mr. Anewalt.

PHILIP H. ANEWALT,

recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

The Court: Mr. Anewalt, you have been sworn before? [566]

The Witness: Yes, sir.

Direct Examination

By Mr. Crouch:

Q. Mr. Anewalt, you were employed by the Concrete Ship Constructors in October of last year, were you not?

A. No, sir; I was not. I think you have me mixed up with Mr. Hotchkiss. I was employed some time later.

Q. About when was it?

A. About three weeks ago.

Q. What was the nature of your employment?

A. To ascertain the fair market value of the leasehold estate created under a certain contract between the Tavares Construction Company and the United States Government, represented by D. P. C.

Q. And you told us the other day when you were on the stand as a witness for the City of National City what your qualifications were. I will ask counsel if they are willing to stipulate to the qualifications.

Mr. Landrum: I am very happy to stipulate to his general qualifications in so far as they went the other day, your Honor, but I believe he is now going to be asked to value something a lot different, and I believe we should have his qualifications for that purpose.

Mr. Crouch: In the interests of economy of time, will you stipulate that with respect to his qualifications to [567] testify as a witness for the Concrete Ship Constructors the same questions were asked and the same answers were given by him as he testified to when he was a witness for the City of National City?

(Testimony of Philip H. Anewalt)

Mr. Landrum: I will be very glad to so stipulate, your Honor.

The Court: So understood, ladies and gentlemen.

Q. By Mr. Crouch: Now, Mr. Anewalt, will you tell the court and jury just what investigations you made with respect to ascertaining what, in your opinion, would be the fair value of the leasehold estate of the Concrete Ship Constructors in the National City plant?

A. In addition to those investigations that I made and that I testified to in connection with the testimony on National City, I consulted a number of contractors who were doing large work for the government in 1942 and 1944. I checked with material houses and subcontractors and checked OPA ceiling prices to get some idea, a definite idea as well as I could, as to the value or change in value of material and machinery, equipment and buildings, and viewed our own records on construction and purchase in our own office. I believe that the other things that I did for National City cover all of the other aspects.

The Court: I think we will take a recess now until tomorrow morning. Tomorrow morning at 9:30 o'clock, ladies and [568] gentlemen. Remember the admonition heretofore given you and keep its terms inviolate.

Mr. Landrum: Your Honor, I have the requested instructions with me. Shall I leave them here or bring them into your chambers?

The Court: Just leave them with the clerk. And I want the defendants' also.

Mr. Monroe: We will have ours tomorrow morning. We had to rewrite part of them today.

(Thereupon, an adjournment was taken until 9:30 o'clock a. m., Friday, February 21, 1947.) [569]

San Diego, California, Friday, February 21, 1947.

9:30 A. M.

The Court: All present. Proceed.

HENRY PHILLIP ANEWALT,

called as a witness called on behalf of the defendants Tavares Construction Company, et al., having been previously sworn, testified further as follows:

Direct Examination (Continued)

By Mr. Crouch:

Q. Have you, Mr. Anewalt, related all of the things which you did in preparation for arriving at your value of this leasehold, which were not testified to by you when you were on the stand as a witness for the City of National City?

A. I don't believe that I mentioned, Mr. Crouch, that I had made a study of the Tavares D. P. C. contract of December, 1941, which I did. I made a very thorough study of it and also checked the cost statements as to the construction work that was done, and discussed them with the officials of the Tavares Construction Company.

Q. As a result of everything which you did, did you arrive at an opinion of the fair and reasonable market value of the leasehold estate of the Tavares Construction Company, Inc. on the 23rd day of December, 1944?

A. I did.

Q. What, in your opinion, was that market value on [571] that date?

Mr. Landrum: If the court please, that is objected to on the grounds of my general objection, which I have heretofore stated, and if I may have it again without repeating it, your Honor.

(Testimony of Henry Phillip Anewalt)

The Court: Yes, sir. The objection is overruled.

The Witness: I beg your pardon. You asked me what my opinion was as to the value, Mr. Crouch?

Q. By Mr. Crouch: Yes, sir. A. \$500,000.

Q. Now, Mr. Anewalt, I want you to forget that you are on the witness stand as a witness in every respect except that you are under oath. I want you to imagine that you are in the homes of these jurors, and that they asked you the question I am going to ask you, and you answer it as though it was their question, and the question is:

What are the reasons, Mr. Anewalt, for you being of the opinion on that date that the leasehold rights of the Tavares Construction Company, Inc. were worth \$600,000 or more, or, I should say, \$500,000 or more?

Mr. Landrum: That is objected to, if the court please, first upon the ground and for the reason that it calls for an imaginary statement; second, it calls for a situation which cannot possibly exist; third, it calls for the presentation of an argumentative statement to this jury rather than [572] proceeding by question and answer.

The Court: I think it may be stripped of its surplusage, and I presume that the witness would answer the same with the additional solemnity that he is under oath here, although I don't know if he would or not, if he had the privilege of going to the homes of the jurors. I do not think those things are of much materiality. I think Mr. Anewalt knows that he is under oath here, and will give his views accordingly, whether being in the privacy of a home or not. This is in open court. He has a right to state his reasons for his answer. That is really what the

(Testimony of Henry Phillip Anewalt)

question means. As so understood, Mr. Anewalt, the objection is overruled, and you may answer. [573]

A. I took into consideration in arriving at that figure the fact that we were at war in 1944, and particularly around that time I had reason to know that we were in very great need of repair facilities.

We had ships in there, transports, that we were trying to get out in a hurry, and we had often to get the gangs for repairs out of town. Those of us that were there had very little idea when this war was going to be over, and, in 1944, we were not just at all sure as to how much we were going to require. They were very strenuous times and we were carrying the war overseas and we needed ships and we needed ships repaired and we needed them repaired in a hurry, and we were working at night to get them out. I took into consideration the fact of the various elements that were involved in this contract that were quite unique, each one depending upon future circumstances, such as the duration of the war, the conditions of the operation of the plant, that could be worth, in my opinion, the \$500,000. One of the elements under this contract that is unique is the so-called free rent period. That period, as you heard, applies after the amortization of the cost to the government while they are constructing or working on Navy vessels or government vessels. That period could have been a minimum of, we will say, 90 days until the period of termination of the contract, or it could have been until 1949. Nobody could well tell for [574] sure how long that would be. They paid in the equivalent of rental a rate figured out on a monthly basis of around \$90,000 a month. On the minimum basis, it would be \$270,000 at that rate. If, on the

(Testimony of Henry Phillip Anewalt)

other hand, you would apply a different rental schedule there, say as we usually work out in these rentals, an amortization of the improvements plus an interest rate on them and a return on the land, it would probably reflect somewhere in the neighborhood of \$30,000 or \$35,000 a month, which would have been half what they had been paying or less. The very unique position that I feel that they felt they were in was that they had the option not only to buy all but not part of the property when, as and if this contract should be terminated, and they would have the ability to negotiate for part of it if they saw fit. But there is one small thing beyond that that, in its turn, could amount to a sizeable amount of money and that is that, if they should get into any negotiation feature and it should go out to the equivalent of bidding by competitors, all they had to do was to meet the highest bid, and I know that in our business, where bidding takes place and where, in normal circumstances, you have to outbid your competition, when you can sit back and relax and wait to see what your highest competitor is going to bid and then get it for that price, you have got an advantage. The element of the improvement in values or increase in values of the equipment, machinery and buildings, from 1942 to what-[575] ever date might be established as the time that the option might be exercised, in my opinion, the acceleration of depreciation, the increase in depreciation, by the formula, was far greater, which would reflect in the option to purchase, than the physical depreciation and the lack of value in the equipment. In other words, because of the scarcity of commodities and because of the difficulty in getting them and because of increased costs, those things, in my opinion, would more than wipe out the

(Testimony of Henry Phillip Anewalt)

accelerated depreciation factor in the formulas they had, that they would have the opportunity of buying that under. I also believe that the increase in value in that land between 1942 and 1944 was a material matter. There is no question in my mind, from analyzing the trend of sales, that there was a very material increase in the value of the land. The ability to sit there in this, again, very unusual and unique position of owning a parcel of land in San Diego Harbor that no individual has owned and I doubt will again have that same opportunity to own in fee, their own deep water in front of the channel, the ship channel there, where they can make their own equivalent of a little harbor, where they can have facilities of rail and water, up adjacent to within a matter of a block each way of a very big and adequate highway, right in the area where industrial development is growing, and the zoning very favorable—if any of you are familiar with the problems of changing zones in [576] these communities for specialized use, you know it is very difficult to get zone variations when you are dealing in heavy industry—and the peculiar configuration of this community, that is, both National City and Chula Vista and San Diego, that the M-1 and M-2 zone areas, where they can be served by rail and by water are very limited, and when you are served by water, it 'doesn't mean it is just water in front of it. It means that there is navigable water, because it is a problem and a big expense when you get to dredging a ship's channel, and, though you may find water at depths where it might be equivalent to a channel, you have considerable unevenness, and, when you handle ships there, unless it is very well buoyed, unless you hit it at the right time at high tide, you are liable to go aground and you

(Testimony of Henry Phillip Anewalt)

are not going to get ships through there without difficulty. [577]

I took into consideration the various costs of these elements, and I couldn't make any fixed differentiation on any one of these particular ones because this contract is peculiar, in that unless you know what the government is going to pay on a fixed date for the land, you can't arrive at a fixed value of that land.

As to the value of the improvements, until you determine for a fact the day that you are going to exercise the option, taking that feature of it, why, you can't tell what you are going to have to pay for that because the depreciation keeps on accelerating.

Now, one thing further in the contract that I don't believe has been mentioned to you is that there is a limitation, and, as I understand it, that they have the option of this formula A and formula B, but at no time should it be less than 15 per cent of the amortized cost—I mean of the gross cost. The formula that would be applicable would be the one that is greater for the government, and that is why primarily we are all considering the operation under formula B, because under formula A, to all intents and purposes there would be no value, because they had already amortized under that formula and paid back in rent the amount that the government had expended.

I took into consideration the records that we had that indicated an increase in rental values. I took into [578] consideration the conditions that prevailed on other tidelands, but, in my opinion and from my experience in making leases through there and sales, where competition

(Testimony of Henry Phillip Anewalt)

would be comparable, and after taking those things all into consideration I felt definitely that I could have, knowing these things and knowing what this ship repair and building picture was, could have sold that contract for at least \$500,000.

Q. You say "at least." Do you think you could sell it for more? A. It is quite—

Mr. Landrum: If the court please, I object to the witness giving his opinion. The question is argumentative.

The Court: I don't know if the witness was giving his opinion as to the fair market value or not, in view of that answer.

The Witness: Yes, sir.

The Court: I understood you to say \$500,000.

The Witness: Yes, sir.

The Court: If that is what you mean—

The Witness: That is my opinion, yes, sir.

The Court: All right. There is no more or no less in that figure. That is the figure given as an opinion of the value. Objection sustained.

Q. By Mr. Crouch: Did you take into consideration the fact of the difference in rights that the Tavares Construction Company would have over this land that it would not have had if it had leased them from the City of National City?

Mr. Landrum: If the court please, that is objected to. It is repetition. The witness has already stated his position on that.

The Court: I think that is a leading question. Sustained.

(Testimony of Henry Phillip Anewalt)

Q. By Mr. Crouch: Something was said about there being an immense amount of lands like this farther on down the Coast that were available. Can you answer that statement?

A. Well, do you mean, sir, by on the Coast the coastal shoreline, or do you mean in San Diego Bay?

Q. Well, I mean farther south.

A. In San Diego Bay?

Q. I am not sure that I know exactly what the man that made the statement had in mind, but I took it—

The Court: I don't suppose we are concerned, are we, with the ocean frontage? We are concerned with the Bay frontage, I think, where it runs down around Otay and National City and Chula Vista, in through there.

Mr. Crouch: I think that is correct. I don't think counsel had in mind other than that, but I mean in San Diego Bay farther south.

The Witness: I am familiar with that area, sir. [580]

Q. By Mr. Crouch: I beg your pardon?

A. I am familiar with that area.

Q. Well, what do you know about it?

A. Well, it is shallow water, more or less, from this parcel down, as far as channel water is concerned, and there are quite varying depths the farther south you go. It shoals out very rapidly, and there are extensive, what we call mud flats down by Paradise Cove and down—and I am talking now of 1942 and '44—off the Sweetwater, and down by Chula Vista. I happen to have sold the fee lands to the Santa Fe Railroad that cover practically all that area, practically adjoining inside of the tidelands and except for a little channel where the old Hercules powder plant was, it is pretty shallow water as a whole. And

(Testimony of Henry Phillip Anewalt)

farther south you get down to where they had the salt works. Of course, they have used the tidelands to advantage there, but it isn't used in connection with shipping or getting the maximum use from a general or utility use of it. I don't know of any other lands down there that I could say in any way were comparable with these, so far as their ready utility is concerned.

Mr. Crouch: Do I understand, Mr. Landrum, that all of the statements which the witness made when he was on the stand for National City or deemed to be available for the Tavares Construction Company, without repeating it on the [581] part of the witness?

Mr. Landrum: We are perfectly willing to stipulate, your Honor, that any testimony this witness or any other witness has given in this case may be used and taken by the jury and taken into consideration not only for the claim of National City but for the Tavares Construction Company.

The Court: So understood.

Mr. Crouch: Thank you. You may cross-examine.

Cross-Examination

By Mr. Landrum:

Q. Mr. Anewalt, when did you first begin your preparation and study that you made to qualify yourself to give an opinion with relation to the fair market value of this property?

A. Intensely I would say about two weeks ago. Generally some time before that when my partner was interested in it.

Q. Prior to the time that you reached your conclusion with relation to what your testimony might be here,

(Testimony of Henry Phillip Anewalt)

do I understand you to say that you had made a very thorough study of the terms of the exhibit which is in this case, known as Exhibit W or Plancor 407?

A. Yes, sir.

Q. Now, there are just a few matters that I think I would like to explore with you. I take it that you consulted [582] very thoroughly with the officials of the Tavares Construction Company, and that they made available to you all of the information which they had and all of the files which they had, did they not?

A. In so far as I know, they did, yes, sir.

Mr. Landrum: May I have the two letters?

(The documents were handed to counsel.)

Q. By Mr. Landrum: I will ask you, Mr. Anewalt, if they made available to you, sir, and you had an opportunity to know that they had written the two letters which are in evidence in this case as Plaintiff's Exhibit 2 and Plaintiff's Exhibit 3? Did you know of them, or, isn't it a fact that you never learned of them until you came into this court room?

A. I haven't read them yet, sir, if you will give me a chance.

Q. All right.

A. I had not seen these letters. I was informed that an offer had been made, and its general—the general circumstances surrounding it.

Q. You have answered the question, please, sir. You never knew that they had written two letters like this, did you?

A. I understood they had written one. I did not know.

(Testimony of Henry Phillip Anewalt)

Q. Now, I want to ask you this question: did you [583] obtain from them, or did you know the number of man-hours, direct man-hours that they had used on these facilities in the year 1942 in the repair or in work for private individuals at this shipyard, not government contracts at all?

A. No, I did not obtain the actual man-hours. I believe it was discussed. I think there was one particular repair job that they made that was discussed, but so far as literally having known of those man-hours and analyzing them, I didn't do that, sir. They would have been available, I am sure, but I didn't get them.

Q. Now, did they disclose to you the number of direct man-hours that they had used these facilities in the year of 1943 in private enterprise, for which they paid rental to the government of the United States?

A. They did not—I did not obtain the actual man-hours in 1943 that they used in private construction. I understood they had done some, however.

Q. Yes. Now, did they disclose to you the actual number of man-hours that they had used these facilities which were bought and paid for by the government of the United States in private enterprise in the year 1944, prior to December 23rd?

A. The same answer applies, sir. I didn't ask for those figures and I did not study them.

Q. In arriving at your conclusion as to the reasonable [584] and fair market value of this property, do you not feel that it was necessary for you to know what might be required as payment as rental if they maintained this lease, prior to December 23, 1944, and used these facili-

(Testimony of Henry Phillip Anewalt)

ties for anything other than the construction of boats for the government.

A. I ascertained about the value, about the price they would pay in using the facilities for other than government work—

Q. All right.

A. —but I did not go into all of the exact man-hours sir.

Q. Let me ask you, how much rental did they pay to the government of the United States for the use of these facilities up until the 5th day of October, 1944?

A. As I understand it, it was two million—

Q. No, how much they had paid—how much had been deducted from what they got from the ships, as rental?

A. A total of \$2,700,000 some odd. I will get it here in a minute.

Mr. John M. Martin: If the court please, I object to the question as to how much had been deducted from the payment of the ships, because the testimony was that not anything was deducted. Mr. Tavares testified that they were paid in full by the government and that the Concrete Ship Constructors paid it to the Defense Plant Corporation. I think [585] it is contrary to what the question is.

Q. By Mr. Landrum: All right. How much money was it that the Tavares Construction Company paid to the Defense Plant Corporation for rentals during that period?

Mr. John M. Martin: For government work or for private work?

Mr. Landrum: For government work. I propose to show the private work.

(Testimony of Henry Phillip Anewalt)

The Witness: From the figures I have it was \$2,775,-807.01.

Q. By Mr. Landrum: In arriving at your conclusion with relation to the fair market value of this property, did you not have to take into consideration the amount of rent that would be paid on this leasehold interest after December 23rd? In other words, fair market value of leasehold interest, is it not, is the bonus or the amount that would be paid for it, less the rental reserve?

A. That is one of the considerations.

Q. All right. Now, assuming that they would use these facilities in the same proportion that they used them prior to this taking, they having paid \$2,700,000 for approximately three years' use, how much rent would they have had to pay if they had made the use of it for private enterprise? How much a year, assuming it was three years?

A. I didn't figure the number of hours. If you are going on 500 man-hours, how many men are you going to work? [586]

Q. No, I am not doing that, sir. They paid as rental \$2,700,000 for approximately three years; is that correct?

A. That is correct, sir.

Q. All right. Then assuming they did not have any more government contracts and they put this yard to the same use for private enterprise, how much rent would they have had to pay per year on that same basis?

A. How many man-hours are you going to use?

Q. No sir. \$2,700,000 divided by 3 is how much?

A. Oh, that would be—by 3?

Q. Three years. A. Something over \$900,000.

(Testimony of Henry Phillip Anewalt)

Q. Then on that same basis, had they not had any more government contracts and kept the lease and used it for construction of boats not for the government, they would have paid \$900,000 a year rent?

A. They would have paid a little more than that on that basis. Oh, they wouldn't have paid it because they were rent-free. You mean if they were going on the basis of purely outside and no government work?

Q. Well, you are predicating your whole theory on the basis that they were going to have continuous and perpetual operation of this yard with contracts for the government, weren't you?

A. I was predicating it on my knowledge of the [587] necessity, sir, for the Navy work that I was in, needing repairs not forever, but for quite a while. Now, I would have assumed, in my opinion, that when this government work stopped that either the one or the other would have terminated the contract, and by reason of that would have owned the facilities, exercised their option, and had the use of them under their own ownership. [588]

Q. By Mr. Landrum: Well, then, did you include anything or allocate anything in your figure which you have given us, as the fair market value to their leasehold rights alone, for getting the option?

A. Yes. There is nothing allocated to any one thing, sir. If you go on the basis of assuming, we have to assume in each one of these cases, as I understand it, that they are going to continue the government work, then, which has free rent. If they don't continue government work, then they have the option to continue it themselves.

Q. Then, it is your opinion that, once they were engaged in the contracts for the construction of ships for the

(Testimony of Henry Phillip Anewalt)

government of the United States, they wouldn't have kept this yard and wouldn't have kept their lease, would they?

A. It is possible but, also, they could have gone ahead and operated on this formula that I believe they had of so much per hour of labor that they used.

Q. That is what I am getting at.

Mr. Crouch: Pardon me; you are interrupting the witness.

The Witness: On the basis of a repair job it wouldn't have been on the basis of the number of man hours they had been using in the past. You can't establish a basis on that until you know what the picture is going to be. If it was going to be a heavy picture of outside work and practically no government work, then I would assume it would be perfectly [589] reasonable with the government if the Tavares Construction Company would have exercised the option.

Q. Basing it upon the same rental that they had when they were constructing ships for the government, and assuming that they had completed their contract with the government and would have used the entire facilities of this yard as they used them in the construction of boats for the government, it is a fact that, to base it upon that same rental, they would have had to pay a rental of over \$900,000 a year, isn't it?

A. If you want to use that figure but I didn't do that and I don't think it would apply in that way.

Q. Did you inquire of them how much use they had made of this yard for private enterprise in 1942 and the rate of rental which they had to actually pay to the De-

(Testimony of Henry Phillip Anewalt)

fense Plant Corporation for the use of it for that enterprise?

A. I asked them as to the rate of the yard; yes, sir.

Q. And what did they tell you?

A. 10 cents an hour.

Q. 10 cents a manhour? A. Yes, sir.

Q. Now, can you tell us, if they used the entire facilities of this yard, assuming they had no more government contracts and they used the entire facilities of this yard in private enterprise, as they did in 1943 in construction of ships for the government,—do you know how much rent [590] that would have figured out at 10 cents per manhour?

A. I could do some figuring. I haven't figured it out, sir. If they were going to get into that type of extensive work, one or the other side would have terminated and they would be there in fee ownership because it says in there, if they are not needed for the repair of government ships, this other phase comes in.

Q. And, therefore, your lease goes out, doesn't it?

A. Yes.

Q. Therefore, you didn't have both the lease and the option, did you?

A. Well, here is the thing—I am sorry—

Q. Go right ahead, sir. With his Honor's permission, you go right ahead.

The Court: He has opened up the inquiry and you may reply to it.

A. The basic principle is this, that they are going to continue and use that for government use, which, in

(Testimony of Henry Phillip Anewalt)

my opinion, would have happened because I am experienced in the Navy, knowing what we needed and how badly we needed it. So I figure very definitely on the basis that there would be a period of probably a year—I couldn't tell you exactly and couldn't tell in 1944 particularly just how long that would be, but I think that reasonable inquiries would have shown the necessity for that kind of work for the War Shipping Adminis-[591] tration and for other interests, the Army Transport crowd, who had no facilities here at that time for repair work—we had to look out for them—and it was my opinion they would continue for at least a year operating for the government's benefit, and under those circumstances they would have had this so-called free rent.

Q. Mr. Anewalt, in our lives the best way to judge the future is by the past, isn't it?

A. It is an indication of it but I wouldn't say it is always the best.

Q. Don't you think that it is better than to project yourself over into the future? Isn't it safer to know what is happening than to try to determine what is going to happen?

A. On that basis, in the last war, and I am talking about the 1917 one, what we were up against there when I came out of that and went into the steamship business—that is one of the things to base it on because then we needed these selfsame things.

(Testimony of Henry Phillip Anewalt)

Q. Both of us who were in that war know what happened, don't we? A. We do.

Q. When you made your inquiry in order to come before this jury and give your opinion with relation to the fair market value of this property, did you know of or did they [592] give you or did you know of the existence of that instrument which I have just handed you?

Mr. John M. Martin: Pardon me. Has that been received in evidence?

Mr. Landrum: No, sir.

The Court: Show it to counsel.

Mr. Landrum: Here is a copy.

The Court: Is that in evidence now?

Mr. Landrum: No; it hasn't been offered.

The Court: Then, it had better be marked for identification.

The Clerk: Plaintiff's Exhibit No. 4 for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 4 for identification.)

Mr. John M. Martin: I have no objection to the letter being received in evidence.

Mr. Landrum: We will be very happy to have it go in, your Honor.

The Court: It may be received and marked Plaintiff's Exhibit No. 4. While it is fresh in the minds of the jury, you had better read it to them.

Mr. Landrum: Yes, your Honor. Ladies and gentlemen, I now read to you Plaintiff's Exhibit No. 4. [593]

“CONCRETE SHIP CONSTRUCTORS

“National City, California

“Post Office Box D

Phone Greeley 7-4163

“December 12, 1944

“Mr. Byron Howells

“Defense Plant Corporation

“316 Pacific Mutual Building

“Los Angeles, California

“Dear Mr. Howells:

“In furtherance of the enclosed, and in response to your telephone call of even date, this Company has entered into Master Repair Contracts with both the U. S. Army and Navy. The billing rate, as provided for by these contracts, does not include an amount for the rental of the facilities as they are Government-owned. In accordance with the enclosed, we requested permission for the use of these facilities in this connection without charge.

“In addition to this work, we are occasionally called upon to repair vessels other than Government-owned. For the purpose of payment to the Government for the use of these Government-owned facilities, we have, in the past, accrued an amount of 10 cents per direct man hour worked. To date, these accruals have amounted to \$2,806.86. The determination of the 10 cents per hour to be charged was made after reviewing direct man hours consumed in connection with the shipbuilding program.

“The yard was constructed to employ 4,000 workers. During the [594] year 1943, 7,283,000 direct man hours were used in connection with the construction of the concrete vessels. This year represented,

more nearly than any other year, the normal expected employment for the yard if sufficient business was at hand. Facilities cost the Government approximately \$2,750,000, including interest, and this amount depreciated on a fifteen-year basis for the year of 1943 would amount to 0.025 cents per direct man hour worked. With this in mind, 10 cents per direct man hour appeared to be adequate compensation for the use of the facilities for other than Government work.

"The following tabulation sets forth man hours and depreciation per direct man hour, by years, for the years 1942, 1943 and 1944, and the average depreciation for the three-year period:

	<u>"Total Direct Hrs.</u>	<u>15-Year</u>
1942	1,534,000	0.120
1943	7,283,000	0.025
1944 (Estimated)	2,742,000	0.069
Average		0.071

"You will note that this average amount is only 7 cents, well beneath the 10 cents allowed.

"In view of the foregoing, we request that permission be granted to continue the practice of accruing 10 cents per direct man hour worked for repair work other than Government or Governmental agencies, for payment to the Government as [595] rental of facilities.

"Very truly yours,

"Concrete Ship Constructors

(signed)

"T. W. Eisenman

"T. W. Eisenman,

"Asst. to Managing Partners

"TWE/mel

"Enclosure" [596]

(Testimony of Henry Phillip Anewalt)

Q. By Mr. Landrum: Did you know of that letter when you arrived at your conclusion?

A. I didn't know of that letter but that would have strengthened my opinion as to the value.

Q. Now, you have made the statement that you based your conclusion upon the fact that the Navy was in great necessity for the repair of ships?

A. I said that that was one of my considerations.

Q. And that whoever had this shipyard would get that work?

A. Yes, sir; if they should get that work.

Q. Well, did they get it?

A. They got some of this work. I know that we tried to get the local yards to use it here. And this rental would make the land worth even more than I was figuring it was worth. They would make a profit on that.

Q. What did it make the lease worth, this lease that you are valuing?

A. I think it made it more valuable.

Q. Assuming that they had used those facilities in the year 1945 to the same extent that they used them in the year 1943, as disclosed by their own letter, how much rent would they have had to pay the government of the United States for the use of it?

A. Using the 1944 figure? [597]

Q. No, sir. He said 1943 was a peak year.

A. Total direct hours—do you mean the 7,000,000 hours?

Q. Yes. Please give us 1943.

Mr. John M. Martin: If the court please, I don't think the question is intelligible. I think it should be framed so that counsel can understand the question.

(Testimony of Henry Phillip Anewalt)

Mr. Landrum: I will frame it again.

Q. Is it not true that they could only use these facilities rent free when they were constructing boats for the government? A. Yes, sir.

Q. What did you mean when you said repair contracts?

A. Repair contracts on the outside. I am talking about if they used construction work for that purpose.

Q. Assuming that they used this thing in 1945; that they had that lease and they were going to do the same work that they did in 1943, for private individuals. How much would they have had to pay to the government of the United States?

A. Well, I can figure it out. Based on the 1943 figure of 7,000,000 hours, and I am using round figures, the total direct hours of seven million odd hours would be 10 cents on that or \$700,000.

Q. Is it your opinion that a lease for which they had [598] to pay that could be sold for \$700,000?

A. Yes, sir, because that paid \$1,000,000 a year under the other contract, when they were building the boats.

Q. The profit that was made on what?

A. Repairing or building.

Q. Do you mean the profit they made out of the government of the United States in this shipyard?

A. I mean the profit they made in the general operation, like everybody else makes a profit.

Q. In arriving at your conclusion with relation to the reasonable and fair market value of this leasehold, of course, you took it by its four corners and included within your figure the entire instrument? A. Yes, sir.

(Testimony of Henry Phillip Anewalt)

Q. What does paragraph 5 of that instrument provide? Well, that is wrong. It is paragraph 9.

A. Do you want me to read it, sir?

Q. Yes; I want you to read paragraph 9.

A. "Paragraph 9. No salaries of Lessee's executive officers, no fees of its attorneys, no part of the expense incurred in conducting Lessee's offices and no overhead expenses of any kind shall be included in the cost of leasing the Site or of the Programs, except that direct expenses of Lessee's Officers or employees and fees of attorneys retained or employed by Lessee in connection with the Programs may be so included to the extent approved by Defense Corporation. [599]

Q. In arriving at your conclusion with relation to the reasonable and fair market value of this property, did you know that, notwithstanding the provisions of paragraph 9, the salaries of the executive officers of Concrete Ship Constructors had been paid out of the money that the government put up here?

Mr. John M. Martin: To which we object as assuming a fact not in evidence and contrary to the evidence thus far given. The testimony thus far by Mr. Tavares was that every item was approved by government audit, and counsel is assuming the contrary in his question.

The Court: Oh, no; that wouldn't vitiate the question, as to whether it was audited or not. Overruled.

Q. By Mr. Landrum: Mr. Anewalt—

The Court: Do you want the question answered?

Mr. Landrum: Yes, sir.

The Witness: May I hear it again?

Q. By Mr. Landrum: In arriving at your conclusion with relation to the reasonable and fair market value of

(Testimony of Henry Phillip Anewalt)

this property, did you know that, notwithstanding the provisions of paragraph 9, the salaries of Tavares, Seabrook and other executive officers of the Concrete Ship Constructors had been paid out of the money which the government put up to build this shipyard?

A. I did not know that, sir. And I would like to ex-[600] plain that answer. May I?

The Court: If it needs explanation, you may go ahead.

The Witness: Because I believe that only parts of their salaries were included in there as approved and applied under the contract. He asked me whether I knew—

The Court: He asked you whether you knew it had been paid.

The Witness: Only part have been paid.

The Court: In other words, your answer is that you now know that some portion of the salaries had been paid?

The Witness: Yes, sir; in accordance with this description here.

The Court: Provision 9?

The Witness: Yes, sir.

Q. By Mr. Landrum: In accordance with Section 9?

A. Yes, sir.

Q. I understood you to say you had made a thorough study of this instrument. A. Yes, sir.

Q. Does Section 9 say they can pay the salary of Tavares?

A. Yes, sir; "except that direct expense of lessee's officers or employees—"

Q. Direct expense upon salaries, are they?

Mr. Crouch: Pardon me; I think he ought to let the wit-[601] ness finish.

The Court: Yes; don't interrupt.

(Testimony of Henry Phillip Anewalt)

The Witness: "except that direct expenses of lessee's officers or employees and fees of attorneys retained or employed by lessee in connection with the Programs may be so included to the extent approved by Defense Corporation." Now, when they have approved it, as far as I was concerned in checking those figures, I would assume they were approved and were right. I knew that some of their salaries were in there.

Q. By Mr. Landrum: Did you construe that paragraph 9 to mean that they could pay the salaries of Mr. Tavares and Mr. Seabrook, or any part of them, out of money put up by the government?

A. I would interpret it that way; yes, sir.

Q. Tell us why that is your interpretation.

A. I am not a lawyer, Mr. Landrum, but, as a layman, I would say that would be included.

Q. What does the word "except" mean to a layman?

A. That it is restricted—wait a minute until I get a better synonym. It means withheld or—

Q. Doesn't it, to put in the language of the street, to you and I mean that you can't pay any salaries of the executive officers of the Concrete Ship Constructors or anything except their direct expenses? [602]

A. Direct; yes, sir.

Q. Now, had you known that, notwithstanding the fact that Exhibit W contained that provision, they had paid salaries, would that have affected your opinion?

A. Well, as a matter of fact, Mr. Landrum, in the estimates I made, because I couldn't get down to any fixing of dates for values, in any cost estimating I would have done, I would have taken the direct costs of the labor and material. I wouldn't have recognized these service

(Testimony of Henry Phillip Anewalt)

costs so-called, but I would have taken, what usually works in the field, of around 10 per cent on the job for what it says in here as service costs. That is general overhead expense that should run on one of those jobs, about 9 to 11 per cent. So I say it wouldn't have made any difference to me whether they were in or out because I wasn't using their so-called service costs.

Q. It has been rather difficult, hasn't it, to figure that?

A. It has been a difficult thing to ascertain because there are problems in it.

Q. Do you think that very fact might enter into the mind of a man or the consciousness of a man who was going to buy that contract?

A. Certainly, he would investigate thoroughly.

Q. And he would find out it contained paragraph 9? [603]

A. Oh, yes.

Q. And he would find out they had paid salaries contrary thereto, wouldn't he?

A. If that would be the interpretation; yes, sir.

Q. And then he would know that the government and the Defense Plant Corporation could immediately cancel this contract for that very reason, wouldn't he?

A. He probably would have checked with the Defense Plant Corporation to ascertain whether it could have been.

Q. Now, do you think he would want to buy a lawsuit with the government of the United States?

A. Not if the Defense Plant Corporation would tell them that was approved and was acceptable. There would be no lawsuit involved.

(Testimony of Henry Phillip Anewalt)

Q. What clause do you consider to be the clause by virtue of which the lessee under here gets an option? Which one is it that you talk about as your option clause?

A. I don't quite recall talking about it as that, sir.

Q. You have made a complete study of this instrument, have you not? A. Yes, sir.

Q. There are options in here, in paragraph 15, I believe, that you are referring to. Paragraph 15 provides only two methods or means under which you could ever get an option, doesn't it? [604]

A. I don't quite interpret it that way.

Q. It provides, "Upon the expiration or termination of this lease or extension thereof pursuant to paragraph 12 hereof, or upon cancellation of this lease or extension thereof pursuant to clause (a) of paragraph 14 hereof," he may have an option? A. That is right.

Q. Now, that, then, takes us back to paragraph 12. Calling your attention to that portion of paragraph 12 which begins, in the second paragraph of it, "At any time when substantial use by lessee of the site, facilities, and machinery shall be no longer required to enable lessee to construct boats for the government, Defense Corporation may, with the written approval of the Maritime Commission," it can be cancelled? A. Yes, sir.

Q. That is one of the clauses, is it not, under which they would have their option? A. Yes, sir.

Q. The other one and the only other one is clause (a) of paragraph 14, under which they could get an option. Now, let's go to that. Paragraph (a) 14 says that all, or substantially all, of lessee's contracts with the government at any time outstanding for the construction of con-

(Testimony of Henry Phillip Anewalt)

crete barges and other boats shall be terminated or cancelled prior to completion. Are you following me?

A. Yes, sir.

Q. It is true, is it not, that those two that I have just read to you are the only clauses in this contract under which they could get an option?

A. Those are the two that are provided.

Q. Now, there is another clause and another ground upon which this Exhibit W, Plancor 407, could be cancelled and terminated?

A. Yes, sir.

Q. And that is clause (b) of paragraph 14, is it not?

A. Yes, sir.

Q. Now, your construction of this instrument is that, if it is terminated or if clause (b) takes place, they are not entitled to an option, are they?

A. If they are in default under these other clauses.

Q. No. Suppose they are not in default under those others at all and suppose the government seeks to invoke its rights under clause (b). They wouldn't have an option, would they?

The Court: Clause (b) refers to the priority clause?

Mr. Landrum: Yes, sir, it reading this way, "the government shall request priority for itself or others with respect to the use of the facilities to be provided hereunder, and lessee shall fail or refuse to give such priority." [606]

The Witness: Yes, sir; if they should fail or refuse to give it.

Q. By Mr. Landrum: Now, if the government should request priority for the United States Navy for the use of those facilities, and the entire facilities, these people would have had to give it to them, wouldn't they?

A. For a period of time possibly.

(Testimony of Henry Phillip Anewalt)

Q. What period of time? A. Indeterminable.

Q. Forever, it might be, might it not?

A. I wouldn't quite believe that but it could be maybe.

Q. Well, if they did want to take this thing and say, "We, the United States Navy and Maritime Commission, through the Defense Plant Corporation—Mr. Tavares, the United States Navy has a lot of ships that need repair. So we want to take this over for another branch of the government." They wouldn't have had any option, would they?

A. Not if they had but at that time we were operating, we were very glad to have any help we could get from outside people.

Q. You were in the Navy? A. Yes, sir.

Q. And you knew all about what the Navy was doing?

A. No, sir.

Q. You didn't know that, by virtue of these two instru-[607] ments which came out and were addressed to your Naval District right here—

A. That is right; to Captain Conger, I believe.

Q. Do you know Captain Conger? A. Yes, sir.

Q. What is the date of those letters?

A. This one is November 28, 1944, and the second one is November 21, 1944.

Q. Let me ask you whether or not this buyer, under the conception we have of fair market value, being a buyer who was willing but not compelled to buy, in possession of full information or such information as a reasonably prudent buyer would have,—if he had had those two letters from the Navy of the United States, asking the Tavares Construction Company what they proposed to do, don't you think he would have figured that the

(Testimony of Henry Phillip Anewalt)

Navy was going to take it over and he may not have any option?

A. These letters aren't from the Navy.

Q. Who are they addressed to?

A. They are addressed to the Navy.

Q. I am sorry. I have got the cart before the horse.

Mr. John M. Martin: Those are what exhibits, Mr. Landrum?

Q. By Mr. Landrum: Don't you think that the buyer would have talked to Captain Conger after he saw those letters? [608]

A. Yes, sir.

Q. Do you think he would have paid \$500,000, then?

The Court: I think you ought to give counsel the exhibit numbers he asked for.

Mr. Landrum: Yes, sir; Plaintiff's Exhibits 2 and 3.

Q. Now, Plaintiff's Exhibit 2 starts off, "With reference to our recent telephone conversation, regarding our disposition of the option given us by the Defense Plant Corporation for and in consideration of the construction of the facilities under Plancor 407, please be advised as follows," and it is addressed to the Eleventh Naval District, San Diego, California, attention, Captain Conger. Now, if a buyer had that letter, do you think he wouldn't have said to the seller, "Mr. Seller, the Navy is going to take it and you haven't got any option"?

A. He would have talked to Captain Conger and I didn't know of any reply that Captain Conger made as to whether they were going to take it or not.

Q. What is the date of those letters?

A. I think one was the 21st of November, 1924, and one was the 23rd of November, 1924.

(Testimony of Henry Phillip Anewalt)

Q. And what is the date under which you are testifying to the fair market value?

A. December 23, 1944.

Q. As a matter of fact, within about six weeks of the [609] date of those letters, the Tavares Construction Company option and lease was brought into this condemnation case, wasn't it?

Mr. Crouch: I didn't hear that question. May I have it read?

The Court: Yes, sir.

(Question read by the reporter.)

Mr. Crouch: No objection.

The Witness: Yes.

Mr. Landrum: I guess that is all.

The Court: Is that all, gentlemen?

Mr. Crouch: No, your Honor.

Redirect Examination

By Mr. Crouch:

Q. Your attention was called, Mr. Anewalt, to the very small amount of private work which the shipyard did in 1944—

Mr. Landrum: Just a moment. If the court please, I don't know where counsel gets the question. It is objected to upon the ground it is absolutely contrary to the evidence in this case under that exhibit.

The Court: I am not going to say whether it is small or great, but it is characterizing testimony which has not been given on the witness stand. And it is a leading question. I think you should leave out these adjective terms which place emphasis on testimony of witnesses, which is

(Testimony of Henry Phillip Anewalt)

not in the record. If you want to testify, you had better take the stand. Proceed. [610]

Q. By Mr. Crouch: Your attention, Mr. Anewalt, was called to the amount of work which the shipyard did for private individuals. I think it was 1944.

A. Either 1942, '3 or '4.

Q. Can you imagine any reason why that amount was not larger than it was—

Mr. Landrum: That is objected to—

Q. By Mr. Crouch: —during those years? [611]

Mr. Landrum: That is objected to, if the court please, first, upon the ground and for the reason that it is contrary to the actual evidence in this case. I would like to call the court's attention to that exhibit which shows what the situation was.

The Court: I think probably counsel has his years a little confused, that is all. Read the question, Mr. Reporter.

(The question was read.)

The Court: I do not understand the question. Sustained.

Mr. Landrum: Did your Honor sustain the objection?

The Court: I do not understand the question.

Mr. Landrum: I am going to object to the question.

The Court: I have sustained the objection to it. I can't understand the inquiry.

Q. By Mr. Crouch: Your attention was called, Mr. Anewalt, to a letter which is in evidence as Plaintiff's Exhibit No. 4, which is dated December 12, 1944, the letter being one written by the Concrete Ship Constructors

(Testimony of Henry Phillip Anewalt)

to the Defense Plant Corporation, in which the statement is made as follows:

"In addition to this work, we are occasionally called upon to repair vessels other than government-owned. For the purpose of payment to the government for the use of these government-owned [612] facilities, we have, in the past, accrued an amount of 10 cents per direct man-hour worked. To date these accruals have amounted to \$2,806.86."

Can you give any explanation of why during those years this ship plant did such a small amount of non-government work?

A. Well, unless I knew the gross amount of man-hours in ratio, Mr. Crouch, I would have a difficult time to establish any ratio there.

Q. As a matter of fact, during those years this nation was at war, was it not? A. That's right.

Q. Practically every large industry in the country that had facilities which could manufacture materials of war was prohibited from doing anything except making munitions of war; isn't that true?

Mr. Landrum: If the court please, that is objected to as contrary to the evidence, contrary to their own evidence in this case, and argumentative.

The Court: I do not think it is contrary to any evidence. It contains assumptions which I think are common knowledge. I don't know whether that is something the witness took into consideration in giving his estimate of the market value of the leasehold that was acquired by the government. [613]

(Testimony of Henry Phillip Anewalt)

Mr. Crouch: I think that will answer the question without the witness making any answer.

Q. By Mr. Crouch: Now, Mr. Anewalt, you have considerable familiarity with various kinds of leases, do you not? A. Yes, sir.

Q. This lease you said was unique. One of these unique features of it is, is it not, that after the government had been repaid the cost of these facilities, thereafter the lessee had free rent? Isn't that rather an unusual clause to be contained in a lease?

Mr. Landrum: That is objected to, first, upon the ground and for the reason it is not proper redirect; second, that it is repetition; third, that it is assuming as a fact something which is not true as a matter of law in the construction of that contract.

The Court: I think that is repetition. You explored that pretty thoroughly. In your examination in chief in extenso you went into the reasons for his giving his valuation of \$500,000 as the market value of the leasehold. I think he mentioned that specific feature. The objection is sustained on the ground it is repetition.

Q. By Mr. Crouch: You were questioned by counsel for the government on cross examination. You brought out that during the period of approximately three years the Tavares [614] Construction Company paid to the government of the United States rent for this plant and facilities in the approximate amount of \$2,775,000 over a period of approximately three years, and you were asked by counsel to divide that amount by three in order to get the yearly rate of rental, which would be approximately \$900,000 a year. As a real estate expert familiar with the ordinary run of leases, and where you have a

(Testimony of Henry Phillip Anewalt)

lease which provides that when the lessor has gotten back the entire cost of what he rents, that thereafter the lessee has the free use of it, what do you conclude, if anything?

A. It would be an advantageous lease for the lessee.

Q. Don't you conclude also that the lessor was trying to get his money back as quickly as possible for the entire cost of the thing leased, and that because of the provision that after he had gotten the entire cost of the thing back, that the lessee would have the free use of it from that time on, that maybe the rent was high?

A. Well, under those conditions that you give me, it would be a logical conclusion.

Q. Now, then if you had a lease that ran from 1941 until 1949, a period of eight years, and the lease provided that the total cost of the rental for the eight-year period was \$2,775,000, and provided that when the lessor got back the entire cost of the property leased, thereafter the lessee [615] should have free rent, don't you think it would be more fair to divide that \$2,775,000 by 8 instead of 3, to get the yearly rate throughout the term?

Mr. Landrum: If the court please, I don't like to interrupt, but I certainly object to the question as leading and argumentative.

The Court: Yes, it is argument. It is something that counsel can go into at the conclusion of the case and ask the jury whether that is not a fair statement, but I believe we had better confine ourselves to testimony and not

(Testimony of Henry Phillip Anewalt)

to argument. The objection is sustained. We haven't heard the other side of it yet.

Q. By Mr. Crouch: Now, Mr. Anewalt, there was one letter that counsel for the government called your attention to on cross examination, which you said confirmed your estimate of value. Counsel did not ask you why, and I will ask you what letter and what there is in it that you had in mind when you made that statement.

A. Well, in establishing the capacities to pay, there are two things that are involved in rents. One of them is the rental value on a competitive basis, and another is the capacity to pay. For instance, in percentage leases the capacity of the people to pay might be considered to be greater in extent to what competitive rental or so-called flat rental might be, and if a going plant or concern can and [616] does pay a high rental, as I would say that that might reflect, that it would establish a high rental rate and would establish, in my mind, a future and higher use value and rental value of the property if owned in fee.

The Court: Mr. Crouch, I think if there is going to be more of the redirect, we will take our recess now, and you can conclude after the recess.

Ladies and gentlemen, we will take a recess for a few minutes. Remember the admonition.

(A short recess was taken.)

The Court: All present. Proceed, Mr. Crouch, and I hope that we can make a little better time from now on

(Testimony of Henry Phillip Anewalt)

than we have so far this morning. I believe we have been a little dilatory here.

Mr. Crouch: That is all, Mr. Anewalt. Thank you.

Mr. Landrum: Just one question, if your Honor please, if I may.

Redirect Examination

By Mr. Landrum:

Q. Mr. Anewalt, counsel has asked you questions with relation to the increase or decrease in the actual use of the facilities of this yard, according to the years set forth in this exhibit. Will you tell the court and jury whether or not those facilities were used more in 1944 than they were in 1943, or less? [617]

A. It shows in 1943 7,000,000 man-hours. I haven't read all the letter through, but this is the digest. And it shows in 1944 2,742,000 man-hours.

Q. State whether or not that doesn't indicate that almost two-thirds of the possible use of that yard was not being used in 1944.

A. I couldn't say, sir, unless I knew about the gross man-hours all the way through what ratio this is.

Q. I know, but the man-hours shown there for 1944 are 2,000,000 something? A. Yes, sir.

Q. And the man-hours shown for 1943 are 7,000,000 something? A. Yes, sir.

Mr. Landrum: That is all, your Honor, that I have.

(Witness excused.)

ROY F. BLEIFUSS,

called as a witness by and on behalf of the Defendant Concrete Ship Constructors, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Roy F. Bleifuss.

The Clerk: Will you spell that?

The Witness: B-l-e-i-f-u-s-s. [618]

By Mr. Crouch:

Q. Where do you reside, Mr. Bleifuss?

A. San Diego.

Q. How long have you lived in San Diego?

A. It will be 40 years in June.

Q. What is your occupation or profession?

A. Real estate, insurance, loans, and property management.

Q. How many years have you pursued that profession?

A. I will have been in the business 39 years next September.

Q. Where? A. All in San Diego.

Q. Have you been connected with any other organizations? A. In the real estate business?

Q. Have you been connected with any other person, firm or corporation in the conduct of your business throughout that period? A. Yes, sir.

Q. Who?

A. I started working in September, 1914, with the Park, Grable Investment Company.

(Testimony of Roy F. Bleifuss)

Q. Pick it up from there without questioning, and tell your experience.

A. I worked for that company until 1919 when we formed [619] the firm of Grable, Francisco & Bleifuss. I continued with them until 1932, at which time I went in business for myself.

Q. What is the general character of the real estate business conducted by you?

A. From 1919 to 1932 we did a general real estate business, but specialized in subdivisions.

Q. Have you ever had any experience as an appraiser, and, if so, what?

A. I am constantly appraising properties for loans. I have been called upon to make appraisals in court at different times. The biggest appraisal which I did was the appraising of the Theosophical Institute on Point Loma. We are constantly appraising properties for sale, listings, loans, and so forth.

Mr. Crouch: Counsel, will you admit his general qualifications, to save time?

Mr. Landrum: I will be very happy to, your Honor.

Mr. Crouch: Thank you.

Q. By Mr. Crouch: You were employed by the Tavares Construction Company along in October of this last year?

A. Yes, sir.

Q. For what purpose?

A. For appraising the value of the leasehold of the Tavares Construction Company. [620]

Q. What did you do in that regard?

A. I went over the property, the site, from one corner to the other, examined the records of the company, the cost statements they had furnished us, and made a general

(Testimony of Roy F. Bleifuss)

preparation and study of the whole setup, the leases, agreements, and so forth.

Q. From that investigation, without going into greater detail, did you arrive at an opinion as to the fair and reasonable market value of the leasehold estate of the Tavares Construction Company, Inc., in the properties being condemned in this action, as such value, in your opinion, was on the 23rd day of December, 1944?

A. I did.

Q. What was your opinion as to the amount?

Mr. Landrum: If the court please, may I have the same general objection to that question as I have heretofore had?

The Court: It may be so understood and that the same ruling is made. Overruled.

The Witness: \$573,000.

Q. By Mr. Crouch: Five hundred and what?

A. And seventy-three thousand dollars.

Q. Now, will you tell the jury the reasons that caused you to reach that opinion?

A. I estimated that that would be the amount that a willing buyer would pay to a willing seller in money, after [621] taking in all the considerations, and within a reasonable length of time. If I were buying the property as of that date, I would take into consideration, first, the location of the site as regards the nation as a whole. I would take into consideration the tremendous swing of population from the East to the West Coast. In that connection I read an article in the Saturday Evening—

Mr. Landrum: Just a minute. If the court please, I don't believe some article he may have read in some news-

(Testimony of Roy F. Bleifuss)

paper, or something, is admissible as going to his special qualifications to determine the value of this property.

The Court: No, I think not. We might get into an exploration then as to the basis of that article, which would extend this trial inordinately. I think the court has a right to consider and to take judicial knowledge of the history of the times, that there has been an inordinate exodus of people from the East to the West Coast and that this region here has been the recipient of the greatest number of people. I think that goes without saying, and we will not have to have much evidence on that. I think that is a factor that the jury would have a right to consider when it comes to make up its verdict as to just compensation. So we will have to eliminate any of these articles that the witness has read.

The Witness: I would take into consideration the lease [622] agreement, and all the advantages that that offers to the purchaser, including the right to purchase at a depreciated value, as set up in the formula, and the negotiation rights that the buyer would have during the option period, the value of the free rental clause in the lease, the right to meet in the 90 days following the option period the best offer at an equal figure which had been submitted by any other purchaser with the privilege of taking 30 days to consider such offer.

I would take into consideration the benefits of acquiring the fee title to the property and its unrestricted use. I would consider the shipyard as of 1944, December 23rd, as a shipyard that was efficient, as had been proved by the fact that it had turned out 47 boats for the government with two at that time under construction. I would consider what it would have cost to replace the facilities,

(Testimony of Roy F. Bleifuss)

and in taking that into consideration I would have questioned whether I would have been able to obtain those facilities at that time.

I think we can assume that the government would have given them the necessary priorities, which would have helped a great deal, but after they had bought the facilities, how long would it take to get them here? Freight was tied up. Ship bottoms were being used for other purposes. Then I would have considered whether or not I would have been able to obtain the labor at that time to put these facilities up. [623] We all know that labor was very short. We all know that some of us even had to cut our own lawns, for if we hired a man we would have to pay him \$1.00 an hour, and he would work three hours. I would have considered all of these things, and I would have estimated that at that time the value of this lease agreement was worth that sum of money.

Mr. Crouch: Take the witness.

Cross Examination

By Mr. Landrum:

Q. Mr. Bleifuss, when did you first begin your studies in order that you might come before us and give us your opinion with relation to the fair market value of the Exhibit W which is in this case?

A. I was employed in October and got down actively to work at it, I would say, about three weeks ago.

Q. When did you first receive a copy, or, when did you first begin your studies of this contract between the Defense Plant Corporation of the United States and Tavares Construction Company?

A. About three weeks ago.

(Testimony of Roy F. Bleifuss)

Q. You made a very thorough study of it?

A. Yes, I did.

Q. And used that in connection with your work to come in and tell us what you thought?

A. Yes, sir. [624]

Q. All right. Now, of course, after you had received your copy of that contract, you went upon the ground and examined it?

A. Yes, sir.

Q. When did you first go actually, physically upon these premises to examine it?

A. Oh, I would say about the second or third day after I received the contract.

Q. All right. Now, could you give us just about a date for that?

A. About the second day of February.

Q. The second day of February, 1947?

A. That is right.

Q. Who was in occupancy of these premises when you went there for the first time to visualize them, so you could see what they were?

Mr. John M. Martin: Objected to as immaterial and not in issue in this case.

The Court: Overruled.

The Witness: The Navy were in possession of practically all of the property, although the Tavares Construction Company were retaining some buildings there for their own use.

Q. By Mr. Landrum: Yes, sir. From that actual visualization of this shipyard, you were able to tell us what, in your opinion, as a bonus would be paid for Exhibit W? [625]

A. No, sir.

(Testimony of Roy F. Bleifuss)

Q. As a matter of fact, there wasn't any of this there for you to see, was there?

A. There was a part of it.

Q. Very little? That is true, isn't it?

A. The four docks were there, and some of the buildings, some of the tracks, the electric conduits.

Q. As a matter of fact, this shipyard had been practically dismantled before you ever saw it; isn't that correct?

A. Most of the buildings had been dismantled and the part of the warehouse that was near the old pier.

Q. Yes. Were these wet docks there then,—

A. Yes, sir.

Q. —all of them. Would you tell us just exactly what was there, when you went there, out of this, if you can?

A. You mean to step up to that (indicating model)?

Q. No, just tell us. I don't want to take much time on it.

A. Well, the wet docks were there. There were some buildings that were used by the Tavares Construction Company. There were the racks there for storing their reinforcing steel, and other miscellaneous facilities were there.

Q. In arriving at your conclusion with relation to the fair market value of these premises, in order that you might [626] deduct what it would cost Tavares and what he could get for it, did you consult with Anewalt and the other gentlemen who have been here?

A. Did I talk the matter over with them?

Q. Yes. A. Yes, sir.

(Testimony of Roy F. Bleifuss)

Q. Did they tell you what was there, or did you ascertain it for yourself?

A. I ascertained it for myself.

Q. Did you ever see it?

A. No, sir. I saw photographs.

Q. Is it proper appraisal practice to evaluate a shipyard from a photograph of it? A. I think so.

Q. All right. Now, do you know from the reading of Exhibit W, which we sometimes refer to as Plancor 407, what it was that Tavares Construction Company actually started out upon this venture with?

A. Will you repeat that question?

Q. Do you know from your understanding and reading of Exhibit W, which we know in this case as Plancor 407, what it was that the Tavares Construction Company actually started out with here? A. Yes, sir.

Mr. Crouch: That is objected to as not proper cross [627] examination, irrelevant and immaterial.

The Court: Overruled.

Q. By Mr. Landrum: What was it?

A. It was tidelands that had been filled. There was a mole out there with a—

Q. Now, just a moment. I am sure that you misunderstood my question. The question that I put to you was: What was it that Tavares Construction Company actually had when they entered into this agreement, Plancor 407, Exhibit W, with the government of the United States?

Mr. Crouch: I renew the objection, for the same reasons.

The Court: What they had? You mean what they had with respect to this project?

(Testimony of Roy F. Bleifuss)

Mr. Landrum: Yes, sir, and it is in this Exhibit W. He says he has studied it.

The Court: I want to know what you mean. It doesn't make any difference what the Tavares Construction Company had outside of this project.

Mr. Landrum: No, sir, within the project.

The Court: You did not say that.

Mr. Crouch: With the question so amended, I withdraw the objection.

Mr. Landrum: That is what I meant.

Q. By Mr. Landrum: What was it that the Tavares Construction Company actually started out with in the [628] establishment of this project?

A. Shall I answer?

The Court: Yes.

The Witness: They had a lease from the City of National City.

Q. By Mr. Landrum: Did they get it from the City of National City?

A. They got it from the Allied Engineers, I believe.

Q. That is right. Now, how many acres did they have under that lease?

A. 18 acres.

Q. Will you be good enough to examine the instrument with me. You studied it carefully?

A. Yes, sir.

Q. Will you go with me to the first page of this one I have, to the third "Whereas" and tell this jury how many acres were within that lease, according to the terms of the agreement upon which you base your valuation?

A. This gives approximately 6 acres.

Q. That is correct, is it not?

A. Yes, sir.

(Testimony of Roy F. Bleifuss)

Q. The contract says 6 acres and not 18?

A. Approximately 6.

Q. Where was the 6 acres?

A. The 6 acres was a part of the 18. [629]

Q. Where was the 18?

A. The 18 acres was a part of the tidelands.

Q. What part of the tidelands, parcel 1, parcel 7, parcel 9, parcel A, or what? A. Parcel 1.

Q. All right, sir, parcel 1. Now, did that lease of the 6 acres in parcel 1 continue, or did they enter into some other arrangement by virtue of which they acquired other leases?

A. Other leases were added to from time to time by the government.

Q. By the government? A. Yes, sir.

Q. So it is your testimony, as I understand it, that Tavares Construction Company had a lease of approximately 6 acres in parcel 1, and thereafter other leases were entered into by the government to acquire additional parcels for this project? A. Yes, sir.

Q. Did you get that from your study of the exhibit or from the study of the records in your Recorder's Office, or where?

A. I got that from the study of the leases.

Q. Do you have a lease from the City of National City running to the Defense Plant Corporation, dated February 1, [630] 1942?

A. From the City of National City?

(Testimony of Roy F. Bleifuss)

Q. Yes. A. No, sir. [631]

Q. By Mr. Landrum: Yes, sir.

A. No; I don't have it.

Q. As a matter of fact, those leases were taken by Tavares and assigned to the government, weren't they?

A. That is right.

Q. Now, is it proper appraisal practice and did you in arriving at your conclusion with relation to the fair market value of this leasehold interest just take a lump sum or did you start out and figure the different items entering into your final conclusion?

A. I took different items into consideration in arriving at my lump sum.

Q. You had to put down a figure for each item, did you not?

A. I considered each item. I didn't put down a figure.

Q. Didn't you put down a figure?

A. I considered that in my lump sum.

Q. In order to consider it, didn't you put down a figure for it?

A. I put down their approximate relationship as to the value of the whole.

Q. By that do you mean that you did put down a figure?

A. I didn't appraise each favorable feature of the lease agreement but I made an appraisal of the composite as a whole. [632]

(Testimony of Roy F. Bleifuss)

Q. Let me ask you this. Maybe you will get it straight. Did you or did you not in your studies of this matter break it down into its component parts and give a valuation to each of those parts?

A. I considered the value of each of the parts.

Q. Is your answer yes, sir?

A. I considered the value of each of the parts to the whole.

Q. What did you consider as the value of the land exclusive of the facilities?

Mr. Crouch: At what time?

Mr. Landrum: On December 23, 1944.

The Witness: I don't know as I have any figures. I considered the value of the land as a part of the whole price.

Q. By Mr. Landrum: You are familiar with Exhibit W, are you not?

A. Exhibit W is which one, please?

Q. That is the contract that brings us into this court room, Plancor 407. A. Yes, sir.

Q. That exhibit provides that the amount which Mr. Tavares should pay for his option would be, first, the amount of money which the government of the United States would have to pay for the land, does it not? [633]

A. Yes, sir.

Q. How much did you consider that the government of the United States would have to pay for the land?

A. I wouldn't have any idea as to how much they would have to pay for it.

(Testimony of Roy F. Bleifuss)

Q. Then, how did you get an idea on something you didn't know about?

A. I merely accepted the land as of December 23, 1944, what they would have paid for the land.

Q. Will you go with me to amendatory No. 5 of that contract and I want you to tell me if that doesn't provide that, if he exercises this option, he must include within the price that he is to pay the cost of this site to the government?

A. Yes, sir; that is right.

Q. Now, if you could not know the cost of this site, how could you figure the fair market value of the whole?

A. The cost of the site under the condemnation proceedings as of 1942, under the acquisition program as of 1942, would not have any bearing on my valuation of the land as of December 23, 1944. They are two different dates.

Q. Yes, sir, but I again ask you isn't it true that, if Mr. Tavares had exercised this option, that, by the very terms of the option itself, he would have had to pay the cost of this land to the government? [634]

A. Yes, sir.

Q. In arriving at your conclusion with relation to this market value and the cost of the land to the government, did you consider the fact that they would have to acquire it by condemnation?

A. Yes, sir.

Q. And that you and these other gentlemen who have appeared here would testify to?

A. Yes, sir.

Mr. Landrum: That is all.

Mr. Crouch: That is all. I will call Mr. Mueller.

EDWIN A. MUELLER,

recalled as a witness by and on behalf of the defendants Tavares Construction Company, et al., having been previously duly sworn, resumed the stand and testified as follows:

Direct Examination

The Court: You have been sworn in this case already, have you not?

The Witness: Yes, sir; I have, your Honor.

Mr. Crouch: Will you stipulate to Mr. Mueller's general qualifications, Mr. Landrum?

Mr. Landrum: I am very happy to, your Honor.

The Court: So understand, ladies and gentlemen.

Mr. Crouch: Will you stipulate that, if he were asked the same questions as a witness for the Tavares Construction [635] Company, Inc., that he was asked when he was on the stand for the City of National City, he would give the same answers?

Mr. Landrum: I will be glad to so stipulate, your Honor.

Mr. Crouch: Thank you.

The Court: So understand.

Q. By Mr. Crouch: Mr. Mueller, without going into detail or into a lengthy narration of everything that you did, is it true that you were asked by me, in behalf of the Tavares Construction Company, Inc., to prepare yourself to be able to form an opinion as to the fair and reasonable market value of the leasehold estate of the Tavares Construction Company, Inc., on the 23rd of December, 1944, and did you make such an investigation and preparation and reach an opinion? A. Yes.

Q. Will you tell the jury what, in your opinion, that value was on that date?

(Testimony of Edwin A. Mueller)

Mr. Landrum: May I have the same general objection that I have heretofore had with relation to that question, your Honor?

The Court: It is so understood. You are not questioning the fact that the witness hasn't been asked if he knows and has in mind the definition of fair market value?

Mr. Landrum: No, your Honor. [636]

The Court: With that understanding, the objection is overruled.

The Witness: The question is not quite clear, Mr. Crouch.

(Question read by reporter.)

The Witness: I have an opinion of the fair market value of a certain lease, coupled with an option, as between the Tavares Construction Company and the United States Government, and that is, to-wit, the matter to which—

Q. By Mr. Crouch: That is what I intended to have you understand.

A. In my opinion, the value was \$500,000.

Q. Now, I want you to tell the jury the reasons which cause you to arrive at that opinion, and in that respect will you not feel yourself bound to not repeat anything which you have previously said with respect to the value of the lands in the city of National City? In other words, I want you to tell the jury fully, for the record in our case, all the reasons upon which you predicate your estimate of value, even though you may, of necessity, have to repeat a number of things which you have previously testified to when you were on the stand.

A. I have heretofore covered the factors which I took into consideration in arriving at the value of the lands taken under the condemnation proceeding by the government from the [637] City of National City; the fact that

(Testimony of Edwin A. Mueller)

the lands were industrial in character; that they had rail facilities as well as water frontage; the fact that, by 1942, when all of the lands taken from National City, with the exception of Area A, were condemned; the existence of lands for industrial purposes in the San Diego area, having water frontage, had become a minimum; that the impact of the industrial development upon the City of San Diego was not felt fully until 1944. I made an investigation of those factors in trying to determine not only the value of the lands but also their necessity and the possibility of their being put to use. I have statistics here, which I don't think the court would want me to take the time to present, which indicate that San Diego grew more industrially and developed more industrially in the period from 1940 to 1944 than it did in its entire history of 80 years, from the time it was a pueblo until it became a city, and that is the important factor to me going to the question of the necessity of these lands for industrial purposes. San Diego has a minimum of industrial lands touching on the waterfront and my investigation of the records of the Harbor Department indicated that the lands of the City of San Diego had all either been leased or promised or spoken for by 1942, and that, consequently, industry had to go farther south, and the next natural place was National City for the reason that there was a deep water channel dredged to the [638] outer edge of the subject property and the property was available for development. With particular reference to the problem of the Tavares Construction Company, I read and studied and analyzed, to the best of my ability, the contract entered into between the Tavares Construction Company and the Defense Plant Corporation, known in this case as Plancor 407, and I found that certain

(Testimony of Edwin A. Mueller)

agreements had been reached there. First of all, Plancor 407 states that the lessee has leased, or proposes to lease, and, when I say lessee, I now refer to the Tavares Construction Company. I may have referred to the lessee as the Concrete Ship Constructors but they are interchangeable; they are partners. In this case the lessee has leased, or proposes to lease, a site at National City, California, consisting of approximately 6 acres of land suitable for the location of such additional facilities, hereinafter called the site, and whereas, and so forth. What I just read is a quotation from the top of page 2 of the agreement or lease known as Plancor No. 407, made and entered into on the 27th day of December, 1941. Now, the lease which is referred to there was entered into on the first day of January, 1942, subsequent to the signing of Plancor No. 407 or the making of this agreement. So, consequently, it is fair to assume that they didn't know how much acreage was involved. And that is further emphasized by the fact that the lease which was actually transferred to the Defense Plant Corpora- [639] tion comprised 18 acres, not six acres. And it is the subject of this lease and its ramifications that we are concerned with here and which I took into consideration. I made a study, to the best of my ability, and analyzed this lease and found that it provided a number of things.

The Court: We will continue with your testimony at 2:00 o'clock this afternoon.

Ladies and gentlemen, we will take a recess until 2:00 o'clock this afternoon. Remember the admonition heretofore given you.

(Thereupon, a recess was taken until 2:00 o'clock p. m.) [640]

San Diego, California, Friday, February 21, 1947.
2:00 P. M.

The Court: All present. Proceed.

EDWIN A. MUELLER,

called as a witness on behalf of the Defendant Concrete Ship Constructors, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Crouch:

Q. Continue with your reasons.

A. Does the reporter have my last statement, please?

(The portion of the record referred to was read.)

A. It provided at the beginning that the Tavares Construction Company, as I have already stated, had or was about to secure a lease from the City of National City covering a parcel of land, and that the Tavares Construction Company agreed to assign this lease to the Defense Plant Corporation, and to build a shipyard for the Defense Plant Corporation. It provided that certain sums of money should be furnished by the Defense Plant Corporation for the purpose of building this shipyard. I think the original amount was \$404,500, and that this sum of money should be returned to the government in the form of rent, or so-called rent, upon the completion of each ship. Originally the rent on the first group of ships was a comparatively modest sum, because [641] it was apparent that it didn't require so much money to amortize the \$400,000 as it did to amortize the larger sum which was used later on. By various amendments, I believe there were six in all, as the Concrete Ship Constructors developed their business, and as the need for

(Testimony of Edwin A. Mueller)

more ships, ship production, became apparent, the government advanced more money to the Concrete Ship Constructors, and in each case then they required a larger payment upon the completion of each ship, so that as they reached each stage of advancement the amount of the payment upon the completion of each ship was sufficient to amortize or pay off the whole sum advanced.

That was the first agreement, as far as advancing money is concerned, and as far as the repayment of money was concerned. The ultimate amount advanced was something in excess of \$2,700,000.

Just skipping briefly through the lease, as a part of his duties Mr. Tavares agreed to prepare and submit plans for the construction of facilities and to construct them when they were approved by the Defense Plant Corporation. Mr. Tavares had the right to employ subcontractors and to enter into contracts, with the approval of the Defense Plant Corporation. The Defense Plant Corporation was to pay all costs of the construction, as the work progressed and when they approved it. Mr. Tavares, or the Concrete Ship [642] Constructors, had the right to purchase items of machinery, provided the Defense Plant Corporation didn't object in writing within three days after they were notified that they proposed to purchase the machinery. [643]

The Concrete Ship Constructors agreed to submit all bills for machinery to the Defense Plant Corporation and that they were to be certified by them. They were to mark each item of machinery or each facility, in so far as possible, to show that it was owned by the Defense Plant Corporation. And then the usual agreements, that the Concrete Ship Constructors would abide by all federal

(Testimony of Edwin A. Mueller)

laws and not discriminate against any worker because of race or religion and so forth; that the title of the facilities and Mr. Tavares' interest in the lease should vest in the Defense Plant Corporation, or those to whom it assigned the lease. The Defense Plant Corporation, in turn, subleased the site and leased the machinery to Tavares and Tavares accepted this lease for the date of the term ending December 31, 1947, and this term was automatically extended to December 31, 1949. And then we come to the termination agreement, which provided that, when substantial use of the site was no longer required to construct ships for the government by Tavares, the Defense Plant Corporation could, in writing, give written notice of termination and the lease would terminate in 10 days, or that Mr. Tavares could give similar written notice and the lease would terminate. And, if either party questioned the right of the other, if a dispute arose as to the right of one party or the other to give this written notice of termination, it provides a very simple machinery there for arbitrating that [644] one question. Then it provided the additional reasons why the Defense Plant Corporation could terminate the lease or cancel the lease, in addition to the one reason, the main reason, set forth before, that, when the necessity for constructing ships was over, in addition to that, the Defense Plant Corporation could cancel the lease (a) if all, or substantially all of Tavares' contracts with the government were cancelled prior to completion; second, if the government were denied priority to the use of the facilities; third, if Mr. Tavares or the Concrete Ship Constructors should go into receivership or bankruptcy; and, finally, if Tavares violated any of the terms of the lease. The option, which has been discussed so frequently here, pro-

(Testimony of Edwin A. Mueller)

vided that, upon the termination notice which I mentioned before, the 10-day notice, then the Concrete Ship Constructors should have 90 days to decide whether or not they cared to buy the plant and its facilities, based upon a certain formula, and that formula or that price upon which they would be permitted to buy it was that they were to pay the Defense Plant Corporation or the government of the United States, first, the cost of the land at the price which it cost the United States government; and, secondly, that they were to acquire these facilities, that is, the machinery, buildings, and so forth, according to a certain formula which is spelled out in the lease, that formula having to do with certain degrees of obsolescence, [645] and that certain of the facilities were depreciated at a certain rate, others at a greater rate and others at still a greater rate. And there was an additional stipulation in the contract that the Concrete Ship Constructors would have a right to negotiate for the purchase of only part of it. The option itself states specifically that they must buy all and not part of it. But, in addition to that, according to the contract, if Mr. Tavares decided not to exercise his option and wanted to negotiate for part of the plant only, it is provided for in the agreement that the government will negotiate. It further provides that the Concrete Ship, in the event that they did not exercise their option and the plant were to be sold to someone else, not a department of the United States government, would have the right to pay the same price as the best offer which the government would receive for the land. In other words, to illustrate that, if the government received an offer of \$1,000 from some foreign corporation for that plant and decided it would accept

(Testimony of Edwin A. Mueller)

the \$1,000, the Concrete Ship Constructors could step in there and say, "Gentlemen, we will give you \$1,000 for the plant." Understand, I am just using figures. There are other customary provisions in the contract, which relate to carrying insurance and so forth, that I don't think it is necessary for me to take the time of this court to mention. Those, I believe, are the main features. Now, in arriving at my value of the [646] lease and of the option, I took all of these things into consideration, the fact that the Concrete Ship Constructors had the right to purchase this plant at a depreciated figure. I took into consideration the fact that they had the right to purchase the land at exactly the same cost that it was to the government and that the government had proceeded to condemn this land in 1942 from the city of National City, and that consequently whatever price the government would pay would be the price applicable in 1942. [647]

Now, it is true that under the terms of the option we could not then determine, nor can I now determine, what the price is that the government will have to pay for that rent. That subject is now in the hands of this court and this jury.

However, it appears to me that a buyer, contemplating the purchase of this lease and this option, if he did not have information of what the actual figures were going to be, would have to use his best judgment as to what a fair price for that land would be as of the date of taking in 1942, and as for area A as at the date of taking in 1944.

In other words, that buyer would have to assume that the ladies and gentlemen of the jury of this court would give National City a fair price, and he would have to

(Testimony of Edwin A. Mueller)

estimate that fair price to the best of his ability; at least, that is the way I proceeded.

I took into consideration that under the terms of this agreement after the Concrete Ship Constructors had repaid to the government of the United States all of the funds it had advanced in the form of rent, that from there on, under the terms of the agreement, the Concrete Ship Constructors were to have the free use of that plant and its facilities in the construction of ships for the United States Government.

I think one very, very important feature of this whole situation is this, and I gave it consideration, although I [648] know no way to translate it into dollars and cents, and haven't attempted to, and that is the fact that in 1944, as has been said so often, we were in a state of war, in a very serious state of war. I don't believe anybody could predict the outcome, nor do I know of anybody or did I know of anybody at that time who could predict the length of the war. Now, these ships were necessary, and here was a plant functioning, producing ships, efficiently constructed apparently, because it won the award for efficiency from the United States government for turning out ships. Here was a plant, a going concern, a tool ready to use to produce ships, and I think that a purchaser of this contract and this lease and option would certainly have given that consideration, that he could step in and buy this plant and proceed to operate without delay. There wouldn't be any costly delay of a year, at least, to build the plant, where he would have his money invested, and it would be costing him interest, and so forth, but here was a plant producing ships.

(Testimony of Edwin A. Mueller)

Mr. Landrum: Just a moment. Your Honor, I feel I should interrupt. The witness is making a plain argument now to the jury, with gestures.

The Court: Did you want to say something, Mr. Crouch?

Mr. Crouch: No, I don't want to violate the rule of the court that we should not argue objections unless special permission is given. [649]

The Court: We have to make some allowance for the fervency of individuals, and I suppose the jury will consider all those factors when it comes to weigh the evidence. Some people express themselves differently than others. It is what they say, and not the way that they say it that is the evidence. We cannot control attitudes and temperamental aspects of people. No two people are alike. They talk differently and explain a matter differently. But it is what they say and not the manner of saying it or the inflection of the voice, or the gestures, or anything of that kind, ladies and gentlemen. It is the effect of what they say that is to control you in this case.

Now, have you completed your statement, Mr. Mueller?

The Witness: Yes, your Honor.

The Court: Proceed.

Q. By Mr. Crouch: Have you finished?

A. Yes.

Q. Were you in court this morning when counsel for the government examined a witness concerning the payment of some \$7,000 in salaries, which he claimed or assumed were paid to the officers of the Tavares Construction Company in violation of the terms of this lease?

A. Yes.

(Testimony of Edwin A. Mueller)

Mr. Crouch: I will ask government counsel if they will stipulate that at the time of the payment of the salaries [650] Mr. Rex Seabrook and Mr. Gregory Smith were not officers of the corporation. Will you?

Mr. Landrum: Certainly.

Mr. Crouch: Thank you.

Mr. Landrum: If you say they were not, they were not. I don't know. The record shows it was paid, that Mr. Tavares' salary was paid and Mr. Seabrook's salary was paid.

Mr. Crouch: Mr. Seabrook was not an officer at that time, if you will take my statement for it, and we will take up Mr. Tavares later.

Q. By Mr. Crouch: Mr. Mueller, the witness who was on the stand at the time that matter was brought up, was asked the question: How could you expect anybody to buy this leasehold knowing that the lease was in default because of this quoted violation? Do you find any provision in the contract regarding what happens in the event of any claimed default?

A. Why, yes, the contract provides that.

Q. What page, please?

A. Let me look it up. I didn't know you were going to ask me this.

Q. Well, I may ask you other questions you don't know I am going to ask you. Paragraph 14. What happens under that in case somebody claims there is a default? What does the contract provide? [651]

A. I can only handle one question at a time, Mr. Crouch. In the event of a default, this is the language of the contract. I don't want to read an excerpt here out of the contract. I want to be fair about it.

Shall I read the whole section, your Honor?

(Testimony of Edwin A. Mueller)

The Court: I don't know if that is necessary. Of course, the jury have the contract before them.

Q. By Mr. Crouch: Yes, there is a lot of it that isn't apropos. You may read it, if you wish, but if you can shorten it down by just reading the portion that has to do with my question, please.

A. Well, it cites the reasons for cancellation of the contract, and the last one refers to adjudicating the lessee a bankrupt. Then I will read on from there, "or for the reorganization of Lessee, or for the purpose of effecting a composition or arrangement with Lessee's creditors, and any such petition filed against Lessee is not dismissed within sixty days, or (d) of any violation of any of the terms, conditions or covenants of this lease or extension thereof by Lessee and the failure of Lessee to cure such violation within thirty days from the giving of written notice thereof by Defense Corporation to Lessee."

Q. Thank you. Then you conclude from that, do you, that before the government could cancel this lease they must give the Tavares Construction Company a 30-day notice, [652] and then the Tavares Construction Company would have the right to cure the default?

A. That is what the lease says.

Q. Now, then, applying that particular paragraph to the situation brought out by counsel, and assuming—assuming—that some of the officers got some salary that they weren't entitled to get under the lease, what would be the procedure under the lease then?

A. The Defense Corporation would notify the Concrete Ship Constructors that they considered that a breach of the contract, and then the Concrete Ship Constructors would have 30 days to cure that breach.

(Testimony of Edwin A. Mueller)

Q. Now, when you were on the stand for the City of National City, you said that one of the factors which it took into consideration was the existence of other leases in the San Diego area. What can you tell the jury regarding that?

A. I repeat what I said before,—that I took into consideration leases on tidelands similar to the subject property and made a comparison of the properties with the subject property, and used those leases as a check of my value.

Q. In your statement made about 10 minutes ago to the jury, you used the expression, “so-called rent.” What did you mean by that phrase? [653]

A. The sum of money collected from the Concrete Ship Constructors upon the completion of each ship, which is designated as rent in the contract, but which is an amount which will retire the principal amount advanced to the Concrete Ship Constructors for the construction of facilities. [654]

It is called rent but it might also be called an amortization fund.

Q. By Mr. Crouch: I believe, when you were on the stand for the City of National City, you said that you were the author of—that you were a member of the California Legislature and were the author of various grants of these tidelands to the City of National City, is that right?

A. I was the author of the 1923 and the 1925 grants.

Q. And I think that you have testified that one of the things which you took into consideration in arriving at your opinion of the value of this leasehold was the fact that, if under this lease the Tavares Construction Com-

(Testimony of Edwin A. Mueller)

pany could purchase this property from the government, it would get a fee title. Will you tell the court and the jury why you made that statement?

A. The original grants to the City of National City, and we can disregard the 1925 grant because all it did was to enlarge the leasing period from 25 to 50 years—the original grant to the City of National City, however, under the 1923 grant, provided that the lands were transferred to the City of National City but it limited their use, or their use is limited, under the constitution, for the purposes of commerce, navigation and fisheries. And it provided further that the lands could never be conveyed away by the City of National City. When I said that the Concrete Ship Con- [655] structors under their contract were to receive the fee title, I meant that they were to receive a title from the United States Government which did not contain that restriction against conveyance. It did not contain any restriction as to leasing the lands. As I understand it, however, the court has instructed us that we are to consider the same features in valuing the land for National City for the purposes of this suit, that there is no restriction to the title.

Q. How did that affect the Tavares Construction Company or the value of its leasehold under this contract?

A. The Tavares Construction Company, had the contract been completed and had the government conveyed this land to them in fee simple, or the Concrete Ship Constructors, would have been the only private owners who held property on the shores of San Diego Bay. They would have been the only ones who had property fronting on the waters of San Diego Bay, who had no restriction as to the length of a lease they could execute,

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who had no restriction as to the alienation of the title to their property, and that is a very valuable right from a business standpoint because very frequently, in fact I think usually, a corporation does not have sufficient funds to finance all buildings and improvements and all of its property and has to borrow. And, as far as I know, banks will not loan money to people for the purpose of constructing improvements on tideland leases in the vicinity of San Diego Bay. [656]

Mr. Crouch: You may cross examine.

Cross Examination

By Mr. Landrum:

Q. I am intrigued by the word "borrow." What do you mean by the word "borrow," to "borrow money"?

A. I mean that an organization that wants to build buildings on a piece of property and does not have sufficient money to do so usually goes to a bank or to a lending institution and borrows money and gives security in the form of a mortgage on this property.

Q. In arriving at your conclusion with relation to the fair market value of the interests of Tavares by virtue of this leasehold, which is in evidence in this case as Exhibit W, you assumed, did you not, that the man who was going to buy it was going to make a success of it?

A. Yes; I assumed he was a good business man.

Q. Do you think he would have had to borrow money, then, if he had a deal like you say here?

A. I don't think it is any reflection on any man's business ability, the fact that he has to borrow money. Even the government of the United States borrows money.

(Testimony of Edwin A. Mueller)

Q. As a matter of fact, they do borrow money down here in the City of San Diego when they only have a lease, do they not?

A. I have no record of any such transaction. [657]

Q. Did you look into that?

A. I inquired very carefully from Mr. Brennan.

Q. Now, I want you to go back to this legislation which you say you introduced in the legislature, both the 1923 act and the 1925 act. The original act of grant to the City of National City provided, did it not, that the City of National City should issue bonds in the sum of \$100,000? Do you remember that?

Mr. Crouch: I object to that as irrelevant and immaterial for the reason that no part of the original act is now the law of this State.

The Court: It may be that, in consideration of the evolution of title, that would be relevant. I can't see how it would. However, the act is here. Counsel has the statutes here. We had better bind ourselves to what was said there rather than to a memory of what was said. I don't recall the exact amount of the bonded indebtedness which was authorized. I think it was in the act of 1918.

Mr. Landrum: 1917 or 1918, your Honor.

Mr. Crouch: Here it is in the 1923 act. And here is the 1925 act.

The Court: I think all that the 1925 act did was to enlarge the period, as I recall.

Q. By Mr. Landrum: The original act, which is Chapter 28, Session Laws of California for 1917, in Section 6 thereof, [658] provides, does it not, that the City of National City shall expend not less than \$100,000

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within five years from the approval of the act? Do you remember that?

A. Just dimly. As a matter of fact, I haven't read the 1917 act lately.

Q. You are the author of the 1923 act, are you not?

A. Yes, sir.

Q. That provision was left out of the 1923 act of which you were the author, was it not? A. Yes.

Q. Why?

Mr. Crouch: I object to that as immaterial. When the legislature made the regrant of these tidelands to the City of National City in 1923, the 1917 act and all of its provisions became obsolete. I would like to pass the acts up to your Honor.

The Court: I read them at one time but I will read them again. I don't believe it all became obsolete; that there were certain features that were corrected by that act. Just hand them to the clerk and he will hand them to the court.

Mr. Landrum: I will hand them all up.

The Witness: What was that question, please?

Q. By Mr. Landrum: The question that I asked was that provision was not renewed in the 1923 act of which you were the author. Why? [659]

The Court: The objection is overruled.

The Witness: Frankly, I don't remember.

Q. By Mr. Landrum: Did I understand you to say that you were the sponsor of the 1923 act of the State of California?

A. Yes, sir. But that was 24 years ago.

(Testimony of Edwin A. Mueller)

Q. And the original act provided that the City of National City should float a bond issue of \$100,000 and spend it on this land, didn't it?

A. I told you I hadn't referred to the 1917 act lately. So, consequently, I cannot give you an intelligent answer.

I will be glad to read it and, if the act says so, that must be true.

Q. Can you tell me whether the City of National City did comply with the provisions of the 1917 act and float a bond issue of \$100,000 and spend it in the improvement of this land?

Mr. Crouch: That is objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: No, I can't tell you that.

Q. By Mr. Landrum: Your original act provided that the City of National City couldn't enter into a lease for a period of longer than 25 years, did it not?

A. That is right. [660]

Q. And you amended that provision, did you not?

A. I did.

Q. Why?

A. Frankly, I can't tell you why, what were the reasons given, but it is obvious the 25-year period wasn't long enough.

Q. Why wasn't it long enough?

A. A person wouldn't go in on a 25-year lease and make the same investment that he would on a 50-year lease. I found that to be the case when Consolidated moved in here. They very nearly didn't come in here because they were limited to 25 years.

(Testimony of Edwin A. Mueller)

Q. I understood you to say you had made a very careful study of the leases entered into by the City of San Diego, did you not? A. I did.

Q. What is your knowledge of those leases?

A. They vary.

Q. They have got some 25-year leases there, haven't they? A. They have.

Q. And some for 50 years?

A. The City of San Diego has a right to make 50-year leases.

Q. Do you know of any of those leases you investigated [661] in the City of San Diego that were 50-year leases? A. Yes, sir.

Q. Were you the author of the 1925 act?

A. Yes, sir.

Q. On behalf of National City? A. Yes, sir.

Q. The 1925 act provides that as to unimproved lands they may enter into a lease for 50 years, together with an extension thereof for another 50 years, does it not?

A. I don't believe the extension clause is in there. I don't think so.

The Court: I will hand that statue to you and you may examine it.

The Witness: I was mistaken. This is the language: "When wharves, docks or piers have not actually been constructed, provided that, where any of said lands are now leased for a period of less than 50 years, the City of National City may extend or renew the same, or make new leases thereon, except that the term of such extension or renewal or new lease shall not exceed 50 years from the date of such extension or new lease."

(Testimony of Edwin A. Mueller)

Q. By Mr. Landrum: At the time you made your appraisal or at the time you prepared yourself to testify in this case, you knew of the existence of a lease to the San Francisco Bridge Company, did you not? [662]

A. Yes; I did.

Q. The San Francisco Bridge Company is a party to this action, for whom you appeared when you testified here in this court room before? That is right, isn't it?

A. I am sorry; I don't understand you.

Q. The San Francisco Bridge Company is a party to this action and they were a party and in this case when you appeared here and testified the other day?

A. That is correct; yes, sir.

Q. Now, you also were aware of the fact that the Tavares Construction Company had received from the City of National City a lease which it took in the place of the lease of the Allied Construction Company lease it had, which was dated January 1, 1942, didn't you?

A. Yes.

Q. You knew that that lease had been assigned by the Tavares Construction Company, under and by virtue of Plancor 407, which is in as Exhibit W, to the Defense Plant Corporation, did you not? A. I did.

Q. And, therefore, that the government of the United States was the owner of the lease on this property covering that 18 acres, didn't you? A. The assignee.

Q. Now, in your figure here that you have put up both [663] before and now, did you consider that that lease had any value to the government of the United States? A. No; I did not.

Q. If that lease had no value to the government of the United States, then how can this other lease that you

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are talking about have a value as against the government? That lease was something that the government owned, wasn't it?

A. Let me understand your question, please. What do you mean by "this other lease"? Do you mean the San Francisco Bridge Company lease?

Q. The San Francisco Bridge Company, on this one right now that you are talking about, Plancor 407.

A. First of all, I have never expressed an opinion as to the San Francisco Bridge Company lease having any value. Now, as to Plancor 407, the elements of value which I find in that contract, which is a lease and an option, do not include any bonus value for the lease itself.

Mr. Landrum: May I have this marked, please?

The Clerk: Plaintiff's Exhibit 5 for identification.

Q. By Mr. Landrum: In other words, as I understand it, you feel that the fact that the government has a lease here which runs for 20 years, I believe, on 18 acres in Parcel 1, and that that belongs to the government, that the government shouldn't claim any value for it? Is that what you [664] say?

A. I said that I ascribe no bonus value to that phase of the contract between the government and the Concrete Ship Constructors.

Mr. Crouch: May I inquire what this is that counsel is showing the witness?

The Court: I haven't any idea. It hasn't been offered. It should be shown to counsel before it is offered.

Mr. Landrum: At this time, if the court please, I offer in evidence a copy—I don't have the original—of a lease which I have been referring to as the lease of the City of National City to Tavares, for the 18 acres, which

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was assigned to the Defense Plant Corporation, and I ask counsel to stipulate with me it may go in evidence.

Mr. Crouch: No objection. [665]

Mr. Monroe: The City of National City will be bound by this testimony, but we will object to it as no sufficient foundation laid, there being no showing of any ordinance for the assignment which is required by the statute.

The Court: If you are objecting as to the authenticity of the proffer, I will have to sustain the objection. What do you mean by that, Mr. Monroe? Do you mean the instrument which counsel produces and which he states is a correct copy, do you mean it has not been certified?

Mr. Monroe: No, I make no objection as to that, your Honor, but I do object to any evidence as to an assignment without showing the authority to assign, as is required by the statute. Frankly, it is my position that there is no valid assignment.

Mr. Landrum: Then you contend Exhibit W, which is Plancor 407, is not a valid instrument, as I understand it?

The Court: I think rights have at least been asserted under the theory that there was a valid lease by the municipal corporation, and also there was a valid lease transferred by the lessee of the municipality to the United States, or, to the Tavares and to the United States. I think we have been proceeding upon that theory, and unless there is some question as to the authenticity of the purported copy which counsel for the government produces, I am inclined to overrule the objection. [666]

Mr. John M. Martin: If the court please, I have supplied counsel for the government, at his request, with the mimeographed copy which he holds. To the best of

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my knowledge, it is a true copy. However, the original, with certain endorsements thereon, is on file with the clerk of the Superior Court in connection with another case. Subject to verification by counsel and upon examination of the original, I will state it is a correct copy.

The Court: Of course, if there be anything upon the original instrument that is not impressed upon the copy which Mr. Landrum has produced, and which he obtained in the manner stated by Mr. Martin, you have a right to correct it.

Mr. Monroe: Your Honor, I am not making any point as to the correctness of the copy. The point that I am making is that there has been no ordinance authorizing any assignment of the lease. The lease itself is valid in the first instance. I make no claim to the contrary.

The Court: No assignment to whom? From whom to whom?

Mr. Monroe: No assignment to the Defense Plant Corporation.

Mr. Landrum: If your Honor please,—

The Court: Just a moment. I want to refresh the court's recollection on something. You do not question the regularity of the lease from the municipality to the Tavares Construction Company? [667]

Mr. Monroe: No, certainly not.

The Court: Dated January 1, 1942?

Mr. Monroe: That is correct.

The Court: The objection is overruled.

The Clerk: This is Plaintiff's Exhibit No. 5 in evidence, heretofore marked for identification.

(Testimony of Edwin A. Mueller)

(The document, heretofore marked Plaintiff's Exhibit No. 5, was received in evidence.)

[Plaintiff's Exhibit No. 5—Tidelands Lease and Assignment thereof. This is same as Exhibit 3 attached to Amended Declaration of Taking and copied herein at pages 129 to 135.]

Q. By Mr. Landrum: I understood you to say that you ascribe or that you give no bonus to that lease; is that right? A. That is correct.

Q. So in order that we may understand what you mean, what do you mean by a bonus upon a lease?

A. That is an expression and term used to indicate a premium value on a lease.

Q. In other words, if I may suggest it to you, it is the price which an owner might receive on the open market for cash for his leasehold interest over and above the rent reserved or the rent that he would have to pay for it; is that right? A. That is correct.

Q. Now, there in that exhibit is a lease which the government of the United States held, running for a period of 20 years on 18 acres of parcel 1, isn't it? [668]

A. That is right.

Q. That lease, which was owned by the government, you say had no bonus? A. Not in my opinion.

Q. But the lease which Mr. Tavares had you say had a bonus of \$500,000?

A. Now, just a minute. Let's clarify that.

Q. All right.

A. In the first instance, you were talking about a lease on 18 acres of land from the City of National City to the Concrete Ship Constructors. In the second in-

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stance you are talking about a lease, coupled with an option which essentially is a contract, involving not only the 18 acres in question, but more acreage, up to approximately 100 acres, involving certain rights as to the purchase of a \$2,700,000 ship plant, and involving many more things other than this 18-acre parcel of land.

Q. Now, just to make it plain, that one isn't worth anything at all, that is right, and that is 18 acres out of this very same land, isn't it?

A. I say that the lease has no bonus value.

Q. All right. So what your testimony really boils down to, in so far as Tavares Construction Company is concerned, it comes out the same way, in other words, it is your opinion that a man would pay \$500,000 more for this setup that we [669] have here, for a shipyard completed and in operation in 1944, December 23rd, than he would have paid for that same shipyard in operation on the 10th day of November, 1942.

A. No, I think I would like to clarify that. My statement is that a buyer would have paid to the Concrete Ship Constructors the sum of \$500,000 for their rights under the terms of Plancor 407.

Q. Yes, sir. And you read to this jury the important portions, or all of the portions in Plancor 407 that you considered of any importance, didn't you?

A. I consider all of them of importance. I didn't read them all. They all go to make up the whole picture.

Q. In response to counsel's questions, you said you had studied it, did you not, and you read to this jury the

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portions thereof which you said you took into consideration and which you considered of importance, didn't you?

A. Those portions which I read were included among all of them, but I had to take them all into consideration.

Q. All right. But to just put it plainly, you did not read paragraph 24 to them, did you?

A. No, I did not read all of the provisions of Plancor 407, because I did not want to take the time of the court. I have said that repeatedly during the examination.

Q. Did you consider paragraph 24 of Plancor 407 of any importance to a man who might be going to buy? Did you [670] read that paragraph to them, Mr. Witness?

A. Yes, I read that, and I gave it very much thought.

Q. Did you read it to this jury today?

A. No, but I would be very happy to.

Q. All right. Now, let me ask you: paragraph 24 provided that the "Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease."

With that clause in there providing that that lease cannot be assigned without the written consent of the Maritime Commission or the Defense Plant Corporation, do you think some man would pay \$500,000 for it?

A. Well, before I can answer that question intelligently, I would like to know this: Is it your position that the lease cannot be assigned?

Q. I am not taking any position, Mr. Witness. I am asking you to testify. Now, you told us that, in your

(Testimony of Edwin A. Mueller)

opinion, a man would pay a bonus of \$500,000 for a lease that had that clause in it, didn't you? That is what you said?

A. I am very sorry. I don't like to disagree with you. If I conveyed that thought to you, I didn't mean to. I said that a man would pay a price of \$500,000 for the [671] rights and benefits which Concrete Ship has under this agreement, Plancor 407.

Q. Well, how much do you think he would deduct, if you say he would pay that for those rights, how much would he deduct from that on account of that paragraph 24 being in there?

A. I asked the attorneys for the Concrete Ship Constructors as to the meaning of this and what its status would be in the condemnation case, and they said that the condemnation itself, the taking by the government, constituted a sale or a taking, a deprivation of the Concrete Ship's rights under this contract, and that consequently, in order to put any value on this whatsoever, it would be necessary to ignore that one clause, and I so did.

Q. All right. Now, it is your testimony that, if you don't ignore one portion of that agreement, then you couldn't give Tavares Construction Company anything; isn't that right?

A. Well, there we go right back to my question.

Q. Yes.

A. I must ask you to clarify your question to me before I can answer. I am sorry, I cannot answer your question.

Q. All right. Now, I understood you to say that you had made a very careful inspection and investigation of the leases which have been executed by the City of San

(Testimony of Edwin A. Mueller)

Diego and [672] which you used as a basis for your arrival at your conclusion of the fair market value of Exhibit W; is that right? A. As a check.

Q. Now, I want you to pay particular attention to the question that I am asking. You have been here in the court room throughout the trial of this action, have you not? A. Most of the time, yes, sir.

Q. You have heard some testimony from the witness stand with relation to leases executed by the City of San Diego, have you not? A. Yes, sir.

Q. I am going to ask whether or not the City of San Diego makes what they call a lease map, on which they carry all of the leases executed by the City of San Diego.

A. Yes, sir.

Q. I will ask you if you have had an opportunity to examine that lease map and know its contents.

A. I have.

Q. I will ask you whether or not there was a single lease entered into by the City of San Diego from the year 1939 clear down to and including the year 1944, up until the first day of October thereof, where the annual square-foot rent for the first five years thereof exceeded over one cent per square foot. First, can you answer me "Yes" or [673] "No," please?

A. No, I can't. That is the truth, but not the whole truth.

Q. All right. That is the truth.

A. But not the whole truth.

Q. That is what we want, is the whole truth. You heard that testimony from this witness stand, didn't you?

A. Yes, sir, I did.

(Testimony of Edwin A. Mueller)

Mr. Crouch: Now, pardon me, counsel. I thought you were going to let him tell the rest of it.

Mr. Landrum: I am going to. I am going to ask him now to tell us the rest of it.

Q. By Mr. Landrum: The question which I have asked you was the rental for the first five-year period; that is right, isn't it? A. Yes, sir.

However, those leases do provide that as they progress the rental is increased. Is that the truth about it?

A. That is true, and now with your permission,—

Q. Yes, sir.

A. —I would like to withdraw my first answer to the previous question, in order to check. I have a record of every lease and permit here, and it is my impression that there are one or two that started at a higher rate. [674]

Q. Well, there is one, the Campbell Machine Company lease, entered into October 1, 1944. It is the map letter X.

Q. What do you find?

A. I find another. I am sorry.

Q. All right. Give it all to us.

A. There is a permit, which is a year-to-year agreement, to the Farm Securities Corporation, which is one and one-half cents per year.

Q. Now, you found the Campbell Machine Company lease? A. Yes, I have it here.

Q. And the initial rent on that is two cents, isn't it?

A. May I ask you the date of that lease?

Q. Yes, sir. The first day of October, 1944.

A. Yes, that lease started out that way.

(Testimony of Edwin A. Mueller)

Q. Now, I think it is proper that I should ask you to do this for us. Explain to us how it comes about that some of us sometimes say that these leases carry a rental of three cents or four cents, and then we will get this straight.

A. That comes about due to the fact that these leases are for a greater period of time than five years. Most of them are for 20 or 25 years, and they graduate each year or each period, and with your permission I will read a typical lease. May I?

Q. You don't need to take the time. I don't think [675] it is necessary.

A. They increase from one cent in the first five years to two cents in the next five, four cents in the next ten, and five cents in the next five years; and it is my contention or my belief that gives an average rental of 3.2 cents per square foot per year for that lease.

Q. All right. Now, are you of the opinion that the use of the facilities of the shipyard were increasing? You said something about the demand for ships. Are you of the opinion that the use of these facilities of this shipyard were increasing from 1943 to 1944, or decreasing?

A. I am of the opinion that they might have increased or decreased, that things were in such an uncertain state that we didn't know which way the war was going, and I wouldn't attempt to say whether they would increase or decrease.

Q. Well, did you make any absolute study of the records of the Tavares Construction Company to determine exactly what did happen there in 1942, 1943 and 1944?

A. Yes, I did examine the records.

(Testimony of Edwin A. Mueller)

Q. Did you find that in the year 1942, which I believe was the year these facilities were first installed and were used, that the total direct hours that this machinery was used was 1,534,000 hours?

A. I can't recall the number. If you will let me [676] see the exhibit, I will be glad to tell you.

Q. Will you take this exhibit, Plaintiff's Exhibit 4, and tell us what it actually shows as to whether the work in that yard was going down or coming up in 1944?

A. In the fourth paragraph on the first page appears this table: 1942, 1,534,000 total direct hours; 1943, 7,283,000 direct hours; 1944, estimated, 2,742,000 hours.

Q. That letter was written by Mr. Eisenman?

A. It bears his signature, yes.

Q. Doesn't it indicate to you, sir, that the work which was being done there in that shipyard was going down in place of coming up in 1944?

A. No, it does not. It indicates there were less hours put in, but it doesn't indicate the cause of that to me. It might be a lull in between contracts. It might be occasioned by many other factors than lack of work.

Q. Do you call a difference between 7,283,000 and 2,742,000 a lull? A. Well, it is a gap.

Q. Now, as a matter of fact, on the date on which you have been asked to value these properties, they were working on their last contract for the construction of ships for the government, weren't they?

A. I believe they were.

Q. All they had left to do was to complete two more [677] barges, didn't they?

A. That seems to have been the record.

(Testimony of Edwin A. Mueller)

Q. All right, sir. Now, in arriving at your conclusion with relation to the fair market value of this Exhibit W, or Plancor 407, you first had to determine how much the Tavares Construction Company would have to pay to acquire the land and the facilities under clause (b) of paragraph 15, which is the option clause, didn't you?

A. That is correct.

Q. All right. Now, how much did you include in your figure for the cost of the land?

A. As I explained at some length before, in my direct examination, I had no cost of the land to go on under the terms of Plancor 407.

Q. Yes.

A. So I estimated the value of the land at the amount which I appraised it for in the National City case.

Q. All right. Now, we will start off with that as a basis. You used your appraisal in the case that we are concerned with here to estimate the amount of money that would be the first money, we will say, that they would have to lay down; is that right?

A. Yes, sir.

Q. Had you not been employed by the Tavares Construction Company, what would you have used? [678]

A. I wouldn't have made an appraisal of Plancor 407.

Q. Had you not been employed by the City of National City, then what would you have used?

A. Really, I am sorry. I can't understand your question.

Q. All right. How much then did we start off here with for land?

A. Before I answer your question, I want to say this, that I made these estimates but when I reached my con-

(Testimony of Edwin A. Mueller)

clusion as to the value of the lease and the option I did not reach it by adding all these estimates together.

Q. Well, it comes out pretty close to an addition of it, doesn't it? A. No, it doesn't.

Q. All right. I want to use what you actually used. You came in here and said it would take about \$3,000,-000 to purchase this thing. Go ahead and let's have you give us your land, please.

A. The basis of the land that I used was \$617,000, the amount I testified to.

Q. \$617,000. Well, that didn't include parcel 4, it didn't include parcel 10, and it didn't include parcel 11, did it?

A. No, sir. I did include those later, however.

Q. When did you include those? [679]

A. I made an appraisal of those. I am talking now about National City land.

Q. But I am talking about how much you put in when you started to evaluate. When you started to figure the bonus on Exhibit W did your \$617,000 include parcel 4, parcel 10, and parcel 11?

A. I didn't go at it quite that way.

Q. Well, did you put anything in for them?

A. Yes, I did.

Q. What did you put in for them?

A. I put in \$11,600 for parcels 4, 9, 10 and 11, difference.

Q. What do you mean? A. Difference—

Q. Difference? What do you mean, "difference"?

A. As between 1942 and 1944.

(Testimony of Edwin A. Mueller)

Q. Why did you figure them in 1944 when the government was condemning them in 1942?

A. Yes, but I am assuming and my testimony is based as of December 23, 1944, the date of the taking.

Q. Didn't you include anything that the government was going to have to pay for them? That was your 1942 valuation, wasn't it? I don't understand you. Am I—

A. Perhaps I haven't made myself clear. The 1942 valuation of parcels 4, 9, 10 and 11 was \$23,000. [680]

Q. Well, did you include that here?

A. Now, just a minute.

Q. All right.

A. The 1944 valuation was \$34,000. The difference was \$11,600 odd. I am dropping the odd dollars.

Q. Why didn't you put in the \$34,000? Isn't that what you figure the government was going to have to pay for it?

A. No, I am figuring the difference between 1942 and 1944. I am not figuring what the government is going to have to pay for it. I am figuring the value of the lease and option.

Q. And didn't you have to figure what the government was going to have to pay for the land? That is the first figure you had to put down, isn't it?

A. That is what I did.

Q. All right. Tell me, and we will get along.

A. I figured the difference of all the land—the differential of all of the land between what the government would have to pay for it and what it was worth under the Concrete Ship option at \$320,000.

(Testimony of Edwin A. Mueller)

Q. Well, to do that you would have to figure what the government had to pay for it. How are you going to figure a difference, without knowing what you start with?

A. I did. I just told you what I started with. [681]

Q. \$617,000? A. Plus the 34,900.

Q. All right. How much did you include in your figures for the interests of the San Francisco Bridge Company, which the government must have acquired in order to carry out Exhibit W?

A. That interest is included in the amount which I allocated to National City as a part of the fee.

Q. How much of the \$617,000 that you allocate to National City did you figure for the San Francisco Bridge Company?

A. I stated before, and I will repeat again I did not allocate any portion of that to the San Francisco Bridge Company. I appraised that land in fee. The total included all its parts, including the San Francisco Bridge. So far as the government is concerned it pays National City the amount. If the San Francisco Bridge Company receives anything out of it, that amount will come out of the amount which is paid to National City.

Q. Well, didn't you figure—didn't you take down in arriving at your conclusion,—you knew the San Francisco Bridge Company had the lease, didn't you?

A. I did.

Q. Well, didn't you figure they were entitled to any bonus? [682]

A. I figured it and I ignored the San Francisco Bridge interest to this extent, that it is all included in the National City land. It is a part of the whole.

(Testimony of Edwin A. Mueller)

Q. The San Francisco Bridge Company had a pier on its property, didn't it? A. It did.

Q. Didn't you have to figure the value of that pier in order to arrive at any figure at all for the City of National City, if you included it in their figures?

A. I figured, as I said before, the value of the land included in with National City. I ascribed no special value to the San Francisco Bridge Company lease or option.

Q. You are getting the interests which the San Francisco Bridge Company had, though, if Mr. Tavares takes up this option, aren't you? A. Yes. He is getting—

Q. Calling your attention to this exhibit here, which is in evidence as one of the defendants' exhibits, it is the model, that interest of the San Francisco Bridge Company laid right in here (indicating), didn't it?

A. Yes, I believe so.

Q. That is the best part of it, isn't it, in your opinion, and you are an appraiser?

A. No, sir, there is no best part. It is all usable, and one part—you cannot say that the one part is better [683] than the other. It all makes up one unit.

Q. Calling your attention to Government's Exhibit 1 over here, I am now pointing to parcel 7 on Government's Exhibit 1, right here. That parcel severs parcel 2, parcel 3, parcel 6 from the water, doesn't it?

A. No, sir, it is all in one ownership. I think we went over that thoroughly the last time you examined me.

Q. Well, do you object to going over it again now you appear here for another defendant? A. No.

(Testimony of Edwin A. Mueller)

Q. In arriving at the conclusion which you have given us with relation to the fair market value as to their bonus, or what he would get as a bonus for the purchase of this property, am I correct in saying that you have put the land in there at \$651,900? If I add your \$34,900 to your \$617,000, then am I correct? The figure that I have, and I will repeat it for you, is \$651,900. Do you have a different figure?

A. I didn't go at it quite the way you are doing it. That is why I am so slow. I have the value of the National City property at \$617,000. Then I have the value of parcel 4 and parcels 9, 10 and 11 at \$34,000.

Q. All right. You didn't say \$34,900?

A. Yes, that is it.

Q. Then if you add the two together you would get [684] \$617,000. Now, in arriving at that conclusion you have fixed that figure as the value of this land as it stood on December 23, 1944 and as it would have to be conveyed to Tavares under his option, haven't you?

A. No. Now, let's straighten this out.

Q. All right.

A. The value that I gave to you of \$617,000 was the value of the land to National City in 1942, and of Area A, in 1944.

Q. Now, let me ask you another question. That is clear enough. Did you have available to you what is in evidence in this case as Exhibit Q when you made this appraisal, in order that you might know how much money the government of the United States through the Defense Plant Corporation had spent in the making of the wet docks, and all of those things?

A. Yes, I had all of those figures.

(Testimony of Edwin A. Mueller)

Q. You placed a valuation of \$651,900 on that land. When you were buying it under the option from the government did you take into consideration the fact that in the preparation of that land the government had spent \$515,000? A. I excluded that.

Q. You excluded it?

A. For the reason that that is included in your facilities cost. [685]

Q. Then what else did you add now to this \$651,000 to get the buying price?

A. I added a 50 per cent increase in all parcels except area A. That is \$308,950.

Q. \$308,950. All right, sir. Now, what else?

A. Then I added an additional value to area A of only \$67,000.

Q. What for?

A. For the rise in value of the land, exclusive—

Q. \$67,000 more for parcel A? A. That's right.

Q. Now, parcel A, you gave that an increase separate from the others. Is that the way I understand it?

A. That is right.

Q. All right. Now, what else?

A. That gave me a total of \$994,000.

Q. \$994,000, yes, sir.

A. From that I subtracted the cost to National City.

Q. Then what?

A. The cost of the land to the government of the National City land.

Q. You subtracted the cost to the government of the National City land?

A. This is the value under the option.

(Testimony of Edwin A. Mueller)

Q. I know, but why did you subtract the cost to the [686] government of the National City land when you started to figure how much you were going to pay on the option?

A. The value of your option is the difference between the cost of the land and the facilities. One of the values of the option is the difference between the cost of the land and the facilities to the government, and its actual value at the date of the exercise of the option.

Q. Yes. But in order to arrive at the bonus that would be paid, you have got to know how much Mr. Tavares would have to pay to take up this option, wouldn't you?

A. That is right.

Q. All right. If you are basing it on your testimony, he would have to pay \$617,000 for your original land valuation that you testified to here the other day, wouldn't he?

A. He would to the City of National City.

Q. All right. Then you figured that between the 1942 and the 1944 valuations there was an increase in the valuation of that land by virtue of the general rise in prices of \$308,950?

A. That's right.

Q. All right. Now, that isn't proper to be included in your figure as to the cost, is it?

A. That is not included as costs, no.

All right. Let's take it out, then.

A. I never had it in. [687]

Q. All right. Then you say something about having added \$67,000 for the increase in parcel A. That doesn't belong in here either, does it?

A. It does when you are figuring the difference in value.

(Testimony of Edwin A. Mueller)

Q. I know. I am going to get that. But you are getting to the second question I was going to ask, and that is the trouble with us. Now, you have a total of \$651,900, you add to that 2,141,000, which is the agreed amount, agreed to between the parties to this action, that the depreciated cost of those facilities would be; that is right, isn't it?

A. Yes, if you are going to do it that way.

Mr. Landrum: Yes, sir.

The Court: I think we will suspend now for a few minutes. Ladies and gentlemen, we will take a short recess. Remember the admonition.

(A short recess was taken.)

The Court: All present. Proceed.

Q. By Mr. Landrum: Now, Mr. Mueller, I believe you started off with a land valuation of \$651,900 and, of course, you accepted and used the agreed figure as arrived at between the parties as to the depreciated value of the facilities, did you not, that is shown in here in Exhibit Q, I believe?

A. Yes; I did.

Q. And that, then, added to what you have used as a land value, would make a total of \$2,792,900? Is that the way you figured it?

A. No; that isn't the way I figured it.

Q. Did you add those two together?

Mr. Crouch: I think you should let the witness finish his answer.

The Court: Yes.

The Witness: You are figuring it the way I didn't figure it. If you care to let me explain it to you the way I figured, I think it will save time.

(Testimony of Edwin A. Mueller)

Q. By Mr. Landrum: I will be glad to as soon as you answer one more question and that is that you add \$6,591,900, which you figured as the cost of the land, plus \$2,141,000, and you get a total of \$2,792,900, don't you?

A. Those two figures added together will give the figure you have stated, I think, although I haven't added [689] them, but I don't agree they represent the things you say they represent, and I would like to explain to you the way I did it.

Q. All right; I will ask you to do that as soon as I ask you one more question.

Mr. Crouch: I submit, if your Honor please, that the witness should be allowed to explain his answer before being examined on another phase of the subject—

Mr. Landrum: I will say to your Honor—

Mr. Crouch: Pardon me; I haven't quite finished. I thought counsel had promised the witness that, as soon as he asked him one more question, he would let him do the explaining.

Mr. Landrum: All right; I will do that now.

Q. Go ahead and tell us how you figured it and let me write it down.

A. We were discussing the land. The value of all the parcels as appraised in 1942, the National City tidelands, was \$617,900 and add an additional value, as of 1944, to that figure of \$67,000 for Area A. Then, I add an additional value, as of 1944, of \$308,950.

The Court: What is that for?

The Witness: That is a 50 per cent increase in the value of all parcels except Area A. That gives me a figure of \$994,187, which is the total value under the Concrete Ship op-[690] tion of the National City tidelands.

(Testimony of Edwin A. Mueller)

The difference payable to National City is my original sum of \$617,961, which indicates an added value under the Tavares or Concrete Ship option of \$376,226.

Now, as to Parcels 4, 9, 10 and 11, I found a value, in 1942, of those parcels of \$23,326. I found a value, in 1944, of those parcels of \$34,989. There is a difference in value in the two dates, in the two groups of land, of \$11,663. This is added to the difference in value of the National City tidelands, which gave me a total difference in value in lands of \$387,899, which would be the indicated gain in the difference in the value of the lands. However, I want to stress again that I did not take that figure as my opinion for the value of the lease and the option. That is merely an indicator.

Q. Is there anything else, sir? A. No, sir.

Mr. Landrum: All right; that is all.

Mr. Crouch: That is all.

Mr. John M. Martin: The defendant Concrete Ship Constructors rest, if your Honor please, with one possible exception. I haven't yet made known to the jury certain indicated paragraphs of the stipulation and I assume, in due course, that may be done.

The Court: Oh, yes. That may be done. Do you want to [691] proceed now, Mr. Landrum, with the government's case?

Mr. Landrum: I am ready, your Honor.

The Court: Very well.

Mr. Landrum: Ladies and gentlemen of this jury, we have now reached the point in the trial of this case where it is my purpose to state, and very briefly, what the testimony which the government of the United States will

be as adduced from that witness stand. Of course, you understand that until now you have only heard the case of the other side. We shall present the testimony which we present as expeditiously as it may be possible for us to present it. We realize that cases of this character are somewhat drawn out and possibly somewhat uninteresting. It is the desire of all of us, I am sure, to present this matter to you fairly.

The question which you will be called upon by his Honor, as I apprehend, to determine here is simply what is the just compensation which the government of the United States should pay to these people by reason of the fact that it has, by virtue of its powers and for purposes of public policy, seen fit to take and to cancel the leasehold interest of the Tavares Construction Company.

We will, first, present to you, ladies and gentlemen, witnesses who will tell you of their qualifications generally to determine the question of fair market value of these lands. They will follow and give to you a statement of their special [692] study and investigation in order that they might arrive at an opinion with relation to the fair market value of these particular lands.

I believe it is fairly well understood now that the date of valuation upon which the lands should be valued, even including Parcel A, is November 10, 1942.

That is the problem which I believe you will be called upon by his Honor to solve in arriving at your verdict with relation to the land. There may be some testimony here to the effect that Parcel A was first entered upon on the 27th or 28th day of August, 1942. That question has not definitely been settled. If it is thought advisable and necessary, we will give you their estimates of the

valuation of Parcel A on the 27th or 28th day of August, 1942.

These gentlemen whom we will present will be Mr. Ewart Goodwin of the City of San Diego. He will tell you who he is and what his experience has been. He will tell you of the efforts he made to investigate this situation. He will tell you of the efforts that he made to determine sales of lands, similar lands and comparable to this land, in the locality in which these were located. He will tell you of his investigation of leases and rentals and he will give to you the workings of his mind as he arrives at his opinion. And, while I may not have it exactly as I feel that he will give it to you, I say to you that Mr. Goodwin will tell you that, in his [693] opinion, the fair market value of all of the lands, including all of the interests therein, as of November 10, 1942, was the sum of \$310,478. He will tell you how he arrived at it. He will tell you that includes, within itself, his figure with relation to the leasehold interest of the San Francisco Bridge Company. I am not sure, and I don't want to misstate, that that includes his figure with relation to the interest of Mr. Johnson. That is Parcel 9. In any event, his figure will be in the neighborhood of \$310,478.

As the matter is now outlined in my mind, he will be followed by O. W. Cotton of the City of San Diego. He will tell you of his general qualifications and experiences. He will tell you that he went upon these premises, for the purpose of making a specific appraisal thereof, in the month of September, first, 1942; that he went there at the request of the Maritime Commission and the Tavares Construction Company, jointly; that he made his investigation. He will tell you what he did. He will tell you

that from then on he has continued his investigation. He will tell you what, in his opinion, the fair market value of this land was. And, when I say "land," I am talking about everything in this case except the lease, coupled with an option, of the Tavares Construction Company, which you have in your hands and which is Exhibit W. He will tell you that, in his opinion, the fair market value of these premises, as of November 10, 1942, was [694] approximately \$220,000.

Then we will bring to you Mr. George Schmultz of the City of Los Angeles. He will tell you of his general qualifications and he will tell you of his special investigation of these particular lands, what he did. And then he will tell you that, in his opinion, the fair market value of the lands was somewhere around \$250,000.

As to the Johnson interest, each of these three gentlemen will give you their opinion of that. I believe, from my memory, that that figure will range somewhere about \$2500 or possibly \$3500.

We will then have completed the testimony in so far as what we call the land is concerned. We feel that in presenting it to you in this way, we can bring it along gradually as the thing progresses and chronologically.

Then we will take up the question of the Tavares contract, what, if anything, the Tavares Construction Company and its associate, the Concrete Ship Constructors, are entitled to as just compensation, at your hands, for the taking away of whatever rights they may have had under Exhibit W.

This case, very largely, in my humble opinion, depends upon a construction of Exhibit W.

We will present to you, too, Mr. Charles Shattuck and Tom Mason of the City of Los Angeles. They will take

up with [695] you the question of the just compensation which is due for the taking away of whatever rights, if any, may have arisen by virtue of that contract which the Defense Plant Corporation entered into with the Tavares Construction Company on the 27th day of December, 1942. Mr. Shattuck will tell you his experience. He will tell you what study and investigation he has made and, when he is asked the question as to what, in his opinion, is the market value of Exhibit W, his answer, ladies and gentlemen, will be zero, nothing.

He will be followed by Mr. Thomas F. Mason of the City of Los Angeles. He will tell you of his general qualifications and of his special study of matters relating to harbors and tidelands. And Mr. Mason, like Mr. Shattuck, will tell you that, in his opinion, the fair market value of Exhibit W, that is, the bonus, the amount of money which a man would pay to have the rights which Tavares had over there, was zero, nothing.

After that has been fully presented, ladies and gentlemen, the defendants in this case, if they see fit, of course, will present to you what we call rebuttal evidence. His Honor will then tell you what the law is and you will decide it. And your great recompense will be a consciousness of a duty well done.

If your Honor please, if I may be permitted, is it necessary for us to proceed this afternoon? Could we take a re-[696] cess?

The Court: I think so; yes. Could we have some indication as to the probabilities of the time that will be necessary from now on?

Mr. Landrum: I do not think there is any question whatsoever but what all of the testimony will be in in this case not later than Tuesday night.

The Court: How do you feel about that, gentlemen of the defense? Is that your understanding also as to your prospects and probabilities?

Mr. Monroe: I think so, your Honor; yes.

The Court: And Mr. Martin?

Mr. John M. Martin: If I understand Mr. Landrum, any possible rebuttal on behalf of my client will be limited to two witnesses rather than five, which will shorten the time. I think it is true that probably by Tuesday night we will all conclude.

The Court: Then, I think we can take the time between now and Monday morning at 9:30, without any prejudice to the case.

Ladies and gentlemen, this is a long recess now until Monday morning at half-past nine. We are not going to have a session tomorrow but, as I told you on yesterday, if this case prolongs itself into the end of next week, we will have to have a session on Saturday of next week. During this re-[697] cess remember particularly the admonition given not to talk about this case or to suffer yourself to be spoken to or approached by any person concerning this case or anything involved in the trial of the case. You are not to form or express any opinions on the case until it is finally submitted to you. I will ask you to leave those papers here, ladies and gentlemen, over the week-end. You may deliver them to the clerk and he will see that they are left here so that they can be returned to you. We will take a recess until Monday morning at 9:30.

(Thereupon, a recess was taken until 9:30 o'clock a. m., Monday, February 24, 1947.) [698]

San Diego, California, Monday, February 24, 1947.

9:30 A. M.

The Court: All present. Proceed.

Mr. Landrum: Mr. Goodwin, will you come up, please.

EWART GOODWIN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Ewart Goodwin.

Direct Examination

By Mr. Landrum:

Q. Will you state your name?

A. Ewart Goodwin.

Q. Where do you live, Mr. Goodwin?

A. I live at 202 Nutmeg, San Diego.

Q. How long have you lived in the City of San Diego?

A. 39 years.

Q. How old are you? A. 39.

Q. What is your business or profession?

A. I am—

Mr. Crouch: We will admit Mr. Goodwin's qualifications.

The Court: I think they should have the right to show generally what his qualifications are; not too extensively, [700] though.

Q. By Mr. Landrum: Will you state again what your business or profession is?

A. General real estate and insurance business.

(Testimony of Ewart Goodwin)

Q. How long have you been engaged in the real estate and insurance business in the City of San Diego?

A. 17 years.

Q. State briefly for the court and jury your experience in connection with the buying and selling and handling of real estate.

A. During the first four years I was engaged in the insurance and real estate business, I engaged in it under the direction of my father and others in our organization. Since 1934 I have engaged in the real estate and insurance business as an independent appraiser and as an independent broker handling the sale and leasing and management of real property.

Q. Will you tell us, just briefly, some of the lands or interests that you have appraised and how you have appraised them?

A. I have appraised virtually all types of land in San Diego County except mineral or timber lands. I have appraised for various individuals in this area, for institutions such as the First National Trust and Savings Bank of San Diego, the Commercial Bank and Trust Company of New York [701] and various law firms in this community and in the city of Los Angeles. I have appraised for the Connecticut Mutual Life Insurance Company. I have appraised properties in virtually all of the cities in the San Diego County area. I have appraised properties on San Diego Bay. I have appraised for the Rohr Aircraft Company. I have appraised the two principal manufacturing plants in National City, the plant of Schiefer & Sons Furniture and Fixture Plant and I have appraised for the plant of the Solar Aircraft in National City. Those two plants, Schiefer & Sons and the Solar Aircraft, I appraised. I appraised for the United States of America

(Testimony of Ewart Goodwin)

additional areas which they took in 1940 and 1941 at the Destroyer Base, now known as the Repair Base. I have appraised various other types of properties in San Diego, hotels, apartments, downtown business properties, residences and various properties in connection with airport facilities and the like. [702]

Q. Have you made appraisals and special studies of harbor properties, in general?

A. Yes; the appraisals that I did for Rohr Aircraft involved a consideration of certain harbor facilities. I appraised the area that was taken on the northeast corner of Coronado. I appraised the Spanish Bight properties belonging to the City of Coronado and the G. D. and A. B. Spreckels Companies in connection with the acquisition at that time.

Q. In connection with your business operations has it been necessary for you to be familiar with the sales and leases in the City of San Diego and City of National City?

A. Yes. We have operated actively in the City of San Diego and in the City of National City. We have managed properties in the City of National City for our clients, and we have made a number—have negotiated a number of loans on properties in the City of National City, in connection with which it was necessary to form an opinion of the value of these properties and submit them to the persons or corporations that were to take the loans.

Q. Now, we are concerned here with what we know as parcel 9, the Johnson properties, and also certain prop-

(Testimony of Ewart Goodwin)

erties belonging to the City of San Diego. Are you familiar with those properties?

A. Yes, I have been familiar with those properties over a period of many years, more particularly during the [703] time commencing in 1940 when we were engaged to appraise properties in that area in connection with acquisitions during 1940 and 1941.

The Court: Can't you hear, Mr. Crouch?

Mr. Crouch: Yes, your Honor. I want a point cleared up. I understood from the opening statement of counsel for the government that Mr. Goodwin was not being used as a witness against our client, but only as against National City.

Mr. Landrum: My purpose, of course, is to have him testify as to his opinion of the value of the lands only.

Mr. Crouch: Well, I want to know whether or not it is necessary for me to pay any attention to his testimony, if not offered against us.

The Court: You had better follow his evidence, Mr. Crouch.

Q. By Mr. Landrum: Now, Mr. Goodwin, have you made a special study and investigation of the lands with which we are here concerned, being parcel 9, the Johnson lands, and the City of National City lands?

A. Yes, I have.

Q. Now, will you tell us just what you did in connection with that study?

A. Yes. Upon receiving the request to proceed with an appraisal of this property, I assembled maps and plats of the area. I inspected the area, and also inspected maps [704] available in the Harbor Department of the City of San Diego as to the progress of work and projected work

(Testimony of Ewart Goodwin)

in that area. I discussed my own opinions with various other realtors in San Diego and in the Los Angeles area who were familiar with harbor property. I discussed the harbor situation particularly with Mr. Joe Brennan, Port Director of the Harbor Department of San Diego, with Mr. Bub, chief engineer for the Harbor Department of San Diego, with Mr. Ireland, engineer for the City of San Diego, with Mr. Eichenlaub of the San Diego and Arizona Eastern Railway Company, with Mr. Krames, assistant passenger agent of the Santa Fe Railway. I obtained information as to the leases existing on the various properties, on the tidelands of the City of San Diego that might be susceptible of comparison with the properties that we were to appraise in the City of National City. I also reviewed other tideland areas available on San Diego Bay, some areas to the south of the subject property, and certain areas that would be available in the City of Coronado, also, of course, on San Diego Bay. I investigated and brought myself up to date as of that time on the housing situation in San Diego and in National City, and the state of the labor market in this area at that particular time.

I studied the development of the district, its accessibility to workers from the standpoint of transportation, buslines, and the like, that would bring them to their work in [705] this particular district. I studied the development of the district. I, of course, have been familiar with it over a period of many years, but studied it further with a view of reaching an opinion as to those trends for the time being and in the future.

(Testimony of Ewart Goodwin)

Q. Mr. Goodwin, did you make an effort to gather information with relation to the sales of property which you considered similar and comparable to this?

A. Yes. Of course, as to sales of tideland property as such, there weren't any. As to sales of industrial lands both in the City of San Diego and in the City of National City, there were some; a number in the City of San Diego, and there were very few in the City of National City.

I was interested in checking those sales with particular reference to interpreting them in view of the condemnation of the parcel that has been referred to as the Johnson parcel, and as to the areas in the tidelands that were being condemned that were something in excess of 1,000 feet from frontage on deep water.

Q. Did you find any sales which you felt you could use in arriving at your opinion? A. Yes, I did.

Q. Did you have knowledge of a sale that has been discussed in this case as having been a sale to a Plywood company? [706]

A. Yes, I was familiar with that sale from the San Diego and Arizona Eastern Railway Company to the Plywood Structures Company, also known as Stewart & Bennett.

Q. Now, I will ask you whether or not that property was sold in 1942.

A. Yes, that property was sold on April 1, 1942.

Q. Do you know who sold it?

A. Yes, it was sold by the San Diego and Arizona Railway Company.

Q. To whom? A. To the Plywood Structures.

Q. Was it sold again in 1944, if you know?

A. Yes, it was. At that—yes, it was sold in 1944. [707]

(Testimony of Ewart Goodwin)

Q. By Mr. Landrum: Do you know the price that was paid for it on the first sale in 1942?

A. Yes; I do.

Q. Do you consider that sale one which might be comparable to the lands known as the Johnson lands and the upland with which we are here concerned?

A. Yes; I consider it quite comparable.

Q. Now, did you find any other sales—

Mr. Crouch: Pardon me; I didn't quite understand. You are asking was the sale comparable. Do you mean comparable to National City land or comparable with the Johnson sale?

Mr. Landrum: I asked him if he considered it comparable with the Johnson land and the upland with which we are here concerned.

Mr. Crouch: May I have the question read?

(Question read by reporter.)

Mr. Landrum: You may answer.

The Witness: Well, I think possibly it might be anticipating something from the standpoint of the sale being comparable. The land is what I referred to as being comparable or susceptible of comparison. Of course, one was tidelands and the other was land that was owned in fee and to which the fee was transferred.

Q. By Mr. Landrum: Were there any buildings on the property at the time of the first sale? [708]

A. No; there were not.

Q. Were there buildings on there at the time of the second sale? A. Yes; there were.

Q. Do you know what they were?

A. Yes. The second sale involved not only the property in Block 281 of National City but also approximately

(Testimony of Ewart Goodwin)

half of the block to the north. In the property to the north, which was included in the second sale, there was located an office and warehouse building on one portion and on another a warehouse building, that was occupied at the time of the second sale by the Sperry Flour people. On the property that was the subject of the sale, or a portion of it that was subject to the sale, in April, 1942, it had located, I think, a warehouse.

Q. Did you find other sales that you took into consideration and considered in arriving at your conclusion?

A. Yes.

Q. Will you take some of them, giving us the name of the seller, the name of the buyer, the date of the sale, but I don't think it is necessary for you to state the price at which it was sold?

A. On October 30, 1942, there was a transaction on a piece of property lying between National Avenue and the San Diego & Arizona Railway right-of-way. This piece of property [709] consisted of approximately 34½ acres. The seller was George V. Johnson and Mildred J. Johnson and the buyer was George D. Shanahan and John H. Shanahan. The more easterly portion of this property was zoned for light manufacturing and the most westerly 500 feet of it in depth, paralleling the railroad right-of-way, was zoned for heavy manufacturing. Most of this property was on original good, solid ground. About one-fourth of it was located on low and marshy ground. This area was comparable to the Johnson property and susceptible of comparison to these areas of the tidelands.

Q. Did you have other sales?

A. I considered the listing of the Santa Fe Railroad on a piece of property directly north of the Johnson parcel

(Testimony of Ewart Goodwin)

and also considered the lease that existed on that property from the Santa Fe Railroad to the Tavares Construction Company.

Q. What was the purpose of your appraisal? What were you going to determine?

A. I was endeavoring to form an opinion of the fair market value of the various parcels, together with the fair market value of the lease that was held by the San Francisco Bridge Company.

Q. What do you understand the words "fair market value" to mean? What is your definition of that, Mr. Goodwin?

A. Well, the fair market value is the highest price, in [710] terms of money, that a given piece of property would bring, exposed for sale on the open market, with a reasonable time to find a buyer willing to buy, not compelled to buy, selling to a seller who is willing to sell, but not compelled to sell, each having a knowledge of all of the conditions, advantages and disadvantages, surrounding the given piece of property, and a reasonable time to find such a buyer and conclude a sale.

Q. I understand you to say that you found and took into consideration some leases, did you not?

A. Yes.

Q. Will you tell us about those leases that you felt that you could consider in arriving at your conclusion?

A. Virtually all of these leases, other than the one referred to, were leases that had been made by the Harbor Department of the City of San Diego to various persons, firms and corporations, who were operating on the tide-lands area of the City of San Diego.

(Testimony of Ewart Goodwin)

Q. Where did you get your information with relation to those leases?

A. From the Harbor Department of the City of San Diego.

Q. Do you know the terms of those leases?

A. Yes. The terms, of course, varied.

Q. What kind of leases were they? How long did they run? [711]

A. Well, all of the bulk of them ran from 15 to 25 years.

Q. Were they a straight lease for that period of time or was it a lease with an option to renew?

A. There were some that were straight leases up until 1941 and, in 1942, the bulk of the leases that had been made were what we might call straight leases or a time lease. There were at that time, and starting then in an accelerated way, no more leases made on a five-year basis with an option for an additional term resulting from—

Q. In other words, the lease provided that it ran five years and then, if the lessee wanted to renew it for another five, he could do it? Is that what you mean?

A. Yes; usually at a graduated rental. They were not all, however, on that basis.

Q. Have you prepared for us a map, what we would call a lease map, showing the leases that you considered?

A. Yes; I have.

Q. Could I have it, please, sir?

Will you mark this for identification?

The Clerk: Plaintiff's Exhibit No. 6 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 6 for identification.)

(Testimony of Ewart Goodwin)

Q. By Mr. Landrum: Mr. Goodwin, I show you Plaintiff's Exhibit for identification No. 6 and I will ask you to examine [712] it and state what it is.

The Court: Have you seen this map, gentlemen?

Mr. Monroe: No, your Honor.

The Court: You may look at it first.

Mr. Crouch: If Mr. Goodwin takes the map direct, we have no objection.

Mr. John M. Martin: No objection.

Mr. Landrum: I understand, your Honor, there is no objection. And may it be understood that this exhibit is in by agreement?

The Court: So ordered, and it will be marked as Plaintiff's Exhibit No. 6 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 6.)

Mr. Landrum: May we put it on the easel?

The Court: Yes.

Q. By Mr. Landrum: Mr. Goodwin, will you be good enough to step down here to the easel with me? Using Exhibit 6 to illustrate your testimony, will you tell the court and jury just what is shown on Exhibit 6?

A. There is shown, in reddish or pink color, on Exhibit 6 the property that is the subject of this particular trial, delineating on it the entire taking in this particular action. The various parcels shown are, starting off with Parcel No. 1, the area that has been referred to, and the [713] area that was, in 1942, leased by the Tavares Construction Company; parcel No. 2, an area that Tavares Construction Company had had under lease at an earlier date; Parcel No. 3, being an area as of the date of the taking

(Testimony of Ewart Goodwin)

in November, 1942, which was still owned by the City of National City but had not been leased to anyone at that time. Parcel No. 5 was a railroad "Y" that had been used by the Santa Fe Railroad, being a "Y" which should be and is distinguished from a spur track, since, under the agreement with the Railroad, it could not be used as a spur track facility. Parcel No. 7 was an area that had been leased from the City of National City by the San Francisco Bridge Company, which area extended out into Area A a distance of 533.25 feet by seven hundred and some feet. It is not shown on here and I don't remember how far exactly it ran from east to west but it would be from the westerly line of this parcel and ran to and intercepted an extension of the east and west line on the north boundary of the same parcel, what we call an oblique parallelogram. Parcel No. 8, shown on this map, was an area that had been leased by the City of National City to a water taxi company, but which lease on the date of taking had been in default for some 10 or 11 years, and the balance of Area A was the area that had not been dredged but was to be dredged as a basin for anchorage of ships and construction of wharves. Parcel No. 9 is the parcel that has been referred to as the Johnson [714] Parcel and is shown on the exhibit, Parcel No. 10 being the area immediately north of the Johnson parcel, that is not the subject of this trial.

Q. Now, the blue that you have over here—what does that mean? Is there any way that you can tie that in to some record that you have?

A. The areas delineated in blue, marked by and pointed to with certain letters of the alphabet designating them, are various leases that have been entered into from 1939

(Testimony of Ewart Goodwin)

on. They might not be accurate as of today. There has been a constant process of negotiation whereby one concern would give up a little bit of land and another concern would take it on. But they indicate the various leases that had been entered into on or about the date of taking.

Q. I notice on Exhibit 6, for instance, the letter "E." What does that mean?

A. The letter "E" would designate that particular lease solely for reference, so that they could readily determine the amount of the rent that was being paid for that particular parcel.

Q. Do you have information on that lease? We will just take "E." Tell us who leased it, to whom and when.

Mr. Monroe: That we will object to as incompetent and immaterial.

The Court: Overruled. [715]

The Witness: "E" was a lease from the Harbor Department of the City of San Diego to the Marine Construction Company. It covered an area of 172,224 square feet or 3.95 of an acre. It was a lease for five years, from 1939 until 1944.

Q. By Mr. Landrum: Do you know the rental that was to be paid? A. Yes.

Q. Do you know the rental that was to be paid on all of these leases? A. Yes.

Q. You have the same opinion on all of these leases here, do you not, that you have given us on that one?

A. Yes; I do.

Q. All right. Mr. Goodwin, there has been some discussion in this case with relation to what a witness had

(Testimony of Ewart Goodwin)

termed plottage, plottage value. What is plottage value, as you understand it?

A. Plottage value is usually used as an expression indicating whether or not, in the opinion of one individual, a given piece of land has plottage value. Property might have plottage value because in a residential district it is of an ideal size and type for the type of improvement that goes in that particular district. The same might be true in an industrial area because it is ideal for the type of industry that is attracted, either because it is smooth or, [715a] on the other hand, because it is of a particular size. It is also used as indicating, for example, a plottage value of a piece of vacant land as compared to a piece of land adjoining it that might have improvements on it, for which you wanted to use the land, and did not see fit then to use it. If you bought the improved land and then had to tear down the buildings and start from there, you might say the unimproved land had a plottage value in comparison to what it cost you, not having to expend the same amount of money on the unimproved parcel to get it in shape to start off with the development which you proposed. [715b]

Q. Well, now, this particular land with which we are here concerned known as the City of National City land, there was a discussion here about inasmuch as that was a large block of land, that it would give an added value to this area. Step down here to this map and tell us what you think about any plottage value to that property.

The Court: You are referring to Exhibit F?

Mr. Landrum: To Exhibit 1, your Honor.

The Witness: Referring to Exhibit 1, and considering the plottage value of that particular property taken as a

(Testimony of Ewart Goodwin)

whole, it had certain advantages from the standpoint that you did have some considerable amount of land available in one piece. It, however, had certain very definite disadvantages, in my opinion. Parcel No. 1 had been leased to the Tavares Construction Company and parcel No. 7 had been leased to the San Francisco Bridge Company. As a result parcel No. 3 had been divided from the frontage on the deep water, which is the principal advantage of tidelands area or any water-front area. The rear portion of parcel No. 3 was over 3,000 feet from the deep water and had access only to it at its most westerly boundary, and even at that point did not front on deep water at the date of taking. It was also intercepted by the Y of the Santa Fe Railroad, and while I believe it would be reasonable to assume that some deal could be made for their Y, if it served the advantage of the City of [716] National City, it could only have been done at some expense to the City of National City or the prospective lessee that they might have had in mind, to whom they might have leased the property.

Q. By Mr. Landrum: All right. Mr. Goodwin, what did you find with relation to the availability of other tidelands about this time?

A. The tideland that fronted on water of an adequate depth over which large ships could navigate was very restricted at this time. There were considerable other properties to the south of this property that could be brought into use and made available to use, but only at a cost, the cost of dredging them and the cost of depositing the spoil in the fill. There were only a comparatively very small number of acres still remaining in the tidelands of the City of San Diego. There were approxi-

(Testimony of Ewart Goodwin)

mately 100 acres in the City of Coronado, some of which had been made available only a matter of a year, or during the year prior to the date of taking here. A good substantial portion of the better area in Coronado was not in use at the date of the taking with which we are concerned here. The area to which I refer is that which was later taken and put to use as a housing project, in the northeasterly tip of the island. As for properties that could be put to immediate use, in tidelands there were very few.

Q. Did you consider that in arriving at your cost?
[717]

A. Yes, I did.

Q. From your experience in connection with buying, selling and handling real estate, and your own personal inspection of this land, do you have an opinion as to the fair market value in this action of the property known as parcel 9, the Johnson parcel, as of November 10, 1942, giving to it all uses for which it was suitable or available as of that date?

A. Yes, I do.

Q. What is your opinion of that market value of parcel 9 on November 10, 1942?

A. In my opinion, the fair market value of parcel 9 was \$2500.

Q. Now, will you just briefly tell us the factors that you took into consideration in arriving at that conclusion?

A. The factors that I took into consideration in arriving at the conclusion, my conclusion as to that particular parcel, had to do with the sale of the parcels that I previously mentioned, that I considered comparable, and the fact that there was a large amount of vacant land still remaining in the City of National City that was comparable to this and that would be in competition with it.

(Testimony of Ewart Goodwin)

I considered the price at which the Santa Fe Railroad was willing to dispose of an area similar in size immediately to the north of it, [718] and I considered the lease on that particular parcel, as I did the lease on this parcel 9 between Mr. Johnson and the Tavares Construction Company.

Q. From your experience in connection with the buying, selling, handling and appraisal of real estate, your own personal study and your inspection of the property known in this action as the National City lands, do you have an opinion as to the fair market value of those lands as of November 10, 1942, for all uses for which, in your opinion, it was suitable or available on that date, leaving out, however, any enhancement or increment in that value due to the expenditure of government moneys prior to that date upon it? A. Yes, I do.

Q. All right, sir.

A. First, for clarification, I am including in my value, however, the improvements that had been made by the San Francisco Bridge Company.

Q. Yes, I understand that. But you are leaving out any improvements made by the expenditure of government money? A. Yes.

Q. All right, sir. A. \$310,475.

Q. \$310,475. Now, within that figure I take it you included what you considered to be the fair market value [719] of the leasehold interest of the San Francisco Bridge Company, did you not? A. Yes, I did.

Q. Will you state to the court and jury what proportion of your \$310,475 you allocated to the leasehold of the San Francisco Bridge Company? A. In dollars?

Q. Yes, sir. A. That would amount to \$45,750.

(Testimony of Ewart Goodwin)

Q. \$45,750 for the leasehold interests of the Bridge Company, and that included the pier or any structures that they had on there?

A. Yes, that included their leasehold interest, including all increments of value.

Q. How did you arrive at your conclusion with relation to the fair market value of the Bridge Company's leasehold interest? Will you break that down for us and tell us your reasoning, as you got that figure?

A. The San Francisco Bridge Company had a lease on the area known as parcel 7, and an extension of the boundaries as I previously explained. That amounted to \$10 a month for the first 10 years of the lease and amounted to \$50 a month for the last 10 years of the lease. In arriving at my opinion of the value on the San Francisco Bridge parcel, I computed the income of \$120 a year times the present value [720] of \$720 a year, receiving it annually over a period of eight years at three per cent, which amounted to \$842.40. I added to that the present value of \$600 a year, deferred eight years at three per cent, which amounted to \$4,039.80. Treating the area as a separate parcel, and considering that the entire parcel had a value of \$77,925, the present value of that amount of money deferred 18 years was \$27,297.13. That amount, therefore, was the amount of interest the City of National City had, expressed in dollars, in this particular parcel of land, which represented a total figure of \$32,175. Subtracting that amount from the \$77,925, we have remaining \$45,750 to be the leasehold interest of the San Francisco Bridge Company.

(Testimony of Ewart Goodwin)

Q. Can you describe for us the structures that the San Francisco Bridge Company had on there?

A. The main structure, consisting of a wharf on the San Francisco Bridge Company property, had a width of 30 feet and a length of 100 feet, with an approach about 16 by 60. They had—there were 10 wood piles on the north side of the main structure, braced with 1 by 12 stringers set in the piles near the top. The water line was protected at the water line by piles with heavy chains through each pile to anchors. That, briefly, would describe the structure.

Q. Now, just discuss with us and tell us your reasons, the factors that you used and the reasons in your mind when [721] you arrived at this conclusion of an overall figure of \$310,475 covering the entire fee in this land we know as the National City lands. Of course, that includes this Bridge Company's figure also?

A. Yes.

Q. Tell us briefly how you thought that thing over.

A. In the absence of any sales that could be directly compared to the entire area, it was my opinion that the fairest method of approach that could be used would be, first, an estimate of the amount of rent that the property would bring. In line with the practice of the City of San Diego, of renting areas that fronted on deep water at the bulkhead line, I felt that the most logical method of approach would be to consider that the value created by the existence of area A as a water front was reflected in the other areas that are the subject of the condemnation; in other words, that area A was comparable to a street or a right-of-way that was used for the benefit of the parcels fronting on it, and that the value of front-

(Testimony of Ewart Goodwin)

ing on a street or right-of-way would be reflected in the rental income of the parcels that fronted on it.

Using that approach, I then allocated what, in my opinion, was a fair rental—might be a fair rental in view of all the conditions that I knew of, and considered might be a fair rental for the various parcels that are the [722] subject of the trial, and then in capitalizing those figures I had one test of the fair market value of the particular property.

Q. At what rate did you capitalize it?

A. Seven per cent.

Q. Do you consider that a fair rate of capitalization on this character of property?

A. Yes, bearing in mind that at a seven per cent rate a city, just like—well, while they don't pay taxes, they do have certain very considerable expenses in services to the tidelands area, whether you would consider it an additional cost or the costs that develop over a period of time, in giving the area police protection, fire protection, certain rubbish and pick-up facilities on the streets that abut the area; the amount that must over a period of time develop and go into overhead in overseeing or retaining men in the city government or in the Harbor Department that are competent to negotiate with prospective lessees and carry on certain services and facilities,—offer certain facilities to the harbor areas.

Q. I want to ask you whether or not you made an investigation and determined what the situation was, in so far as income received by the City of National City for these lands was. prior to the year 1942.

A. Yes, I did. [723]

(Testimony of Ewart Goodwin)

Q. What was the situation, in so far as the City receiving an income from these properties prior to that date?

A. Well, outside of the lease to the San Francisco Bridge Company, they had not received any income from the properties, anything substantial or anything more than a nominal rent that might have existed from time to time from some use of the property.

Mr. Landrum: You may cross-examine.

Cross Examination

By Mr. Monroe:

Q. Mr. Goodwin, in your qualifications you did not say that you were a licensed broker, but I presume you are? A. Yes.

Q. Do you belong to any organizations of licensed brokers? A. Yes, I do.

Q. What are they?

A. I belong to the San Diego Realty Board, the California Association of Real Estate Agents, the National Association of Real Estate Agents. I am a member of the National Brokers Association, and a member of the American Institute of Real Estate Appraisers.

Q. With reference to the San Diego Realty Board, that is composed of brokers in the City of San Diego and other affiliate members; is that right? [724]

A. Yes.

Q. Do you recollect offhand about how many licensed brokers belong to that organization?

A. In the City of San Diego?

Q. Yes. A. Why, I would say in excess of 200.

Q. If I would suggest 240, that would not be far off, would it? A. I beg pardon?

(Testimony of Ewart Goodwin)

Q. If I would suggest 240, that would not be far off, would it? A. That is about it.

Q. That is broker members of the Board?

A. Yes.

Q. There are a great many other brokers in San Diego that do not belong to the Board?

A. Yes. Well, I don't believe there are a great many brokers that don't belong.

Q. Now, let's take first, Mr. Goodwin, the matter of the San Francisco Bridge lease. I take it that you consider that that lease had an added value or a bonus value by reason, first, of there having been some improvements made on the property and, second, because of the favorable terms of the lease? A. Yes. [725]

Q. Now, I think you stated, if you have your figures before you there, that the value of the entire parcel, that would be the 16.46 acres covered by the San Francisco lease, was \$77,925; is that right? A. Yes.

Q. That is the figure that you gave?

A. Yes, it was a little less. It was less than 16 acres.

Q. How is that?

A. It was somewhat less than 16 acres.

Q. You are right. It was 14 and a fraction acres?

A. Yes, sir.

Q. That is right. 6.26 acres out of area A and 8.2 acres out of parcel 7; is that right? A. Yes, sir.

Q. It was 14.46 acres. Now, first, how did you arrive at that value of \$77,925 for the entire parcel?

A. It was my opinion that the area known as parcel 7, which is colored with the— well, there are two or three blues on it, but I imagine everyone is familiar with it by this time—that the area consisting of 6.26 acres front-

(Testimony of Ewart Goodwin)

ing on area A could have rented as an area having access to the water, or, the area that had been dredged to a depth of 10 to 13 feet, and would have a rental value of 2 cents a square foot. [726]

Q. All right. You capitalized that at seven per cent; is that right? A. Yes.

Q. And that brings the figure of \$77,925?

A. Yes.

Q. When we say that we capitalize it, what we mean is, Mr. Goodwin, that we take the amount of money which, if invested at seven per cent per annum, would produce the same amount of income as you figure is the rental value; is that right? A. Yes.

Q. So that what you do is simply take the income or what you estimate is the reasonable income from the property, and you take the amount of money that at seven per cent would produce that income?

A. That is right, considering all the other factors, of course. [727]

Q. By Mr. Monroe: In taking that overall value for that 14 and a fraction acres, did you take into consideration any added value by reason of the improvements which the San Francisco Bridge Company had, themselves, placed on the property?

A. Yes. In other words, when I placed the value that I felt that property would bring on a lease, I considered the property in the condition that it was in on the 10th of November, 1942.

Q. I am trying to get at, if I can, the question of figures. Have you in mind or did you give any figure

(Testimony of Ewart Goodwin)

of valuation of the improvements which the San Francisco Bridge Company had made?

A. I had in mind and knew of what it was but, in considering what it would rent for, you couldn't break it down because it was one parcel of property. You couldn't break it down as to what one piece was worth or one improvement was worth, and add it to the remainder.

Q. You haven't, then, broken it down as to how much added value in dollars there was by reason of the improvements, how much that added to the total value of the plot?

A. I don't think that you can say exactly how much it added. You had a piece of land of a certain size that could be rented and it had a certain rental value. I considered the improvements and considered, of course, that the property [728] was dredged. In reaching my opinion as to value, and being interested in all facts that surrounded it, I estimated what the wharf would cost and what the dredging might have cost, and had that in mind at the time I reached my conclusion; in other words, as to what it would have cost for anyone else to put themselves in the same position that the San Francisco Bridge Company enjoyed.

Q. Is this the fact, Mr. Goodwin, that an improvement does not, necessarily, add to the value of the land to an extent equal to the entire cost of the improvement?

A. Yes; that is correct.

Q. And sometimes it does? A. Yes.

Q. Sometimes a fellow will build a house on a piece of property that does not enhance the value of the property anywhere near the cost of that house? That is correct, is it? A. Yes, sir.

(Testimony of Ewart Goodwin)

Q. As to these particular improvements, would you think that they enhanced the value of the property something comparable to their price, or would you think that enhancement was something less than the price?

A. I would say they enhanced the value of the property, certainly, to the extent of their cost and, in my opinion, in addition to the extent of their cost.

Q. Then, you would say that you would think that the [729] cost of them—whatever might be the reasonable cost would enhance them to that extent?

A. I think it did in this instance; yes.

Q. What approximately would you figure as the reasonable cost of those improvements?

A. In my opinion, the reasonable cost of the wharf was in the neighborhood of \$12,000 and the reasonable cost of the dredging of the area that they had leased at that particular time was in the neighborhood of thirteen to fifteen thousand dollars.

Q. All right. Then, taking that altogether, you would figure that the reasonable enhancement of the value of the entire parcel was from twenty-five to twenty-seven thousand dollars by reason of the improvements that had been put on there pursuant to the lease?

A. Yes, sir.

Q. And am I correct that you feel that those improvements would enhance the value of the property itself and would, also, enhance the value of the leasehold?

A. Yes; it had an effect on the entire area.

Q. Now, you would figure, then, that there is something in the nature of \$20,000, in addition, that is an

(Testimony of Ewart Goodwin)

added value to the leasehold because of the favorable terms of the lease, is that right?

A. Yes; the conditions that existed at the time. [730]

Q. Now, let's see if we understand one another as to how that comes about. If a piece of property has a rental value of \$100 a month and you own it and you lease it to me for \$100 a month, you would figure there was no increased value by reason of the terms of the lease, is that right?

A. Probably.

A. In other words, the theory is that, if property is leased under a lease which calls for its reasonable rental value, there isn't any bonus value to the lease arising by reason of the terms of the lease?

A. That is right.

Q. And so that it is only when the owner leases property for less than its worth there comes to be a bonus value by reason of that leasing?

A. Yes. I am not sure, just thinking about it quickly, that the expression "less than its worth" might be a logical, fair expression under all of the conditions but, generally speaking, it is less than the value that possibly the other man, with funds, equipment and facilities, can get out of it.

Q. In other words, it is because of the terms of the lease, because they are very favorable to the tenant, that the tenant has a value to his leasehold estate?

A. Yes.

Q. So that, if the owner makes a lease of his property for a very small amount of rent or an amount of rent that is [731] less than the reasonable rental value, and that lease is for a period of time, in effect, what that

(Testimony of Ewart Goodwin)

owner has done is he has, by executing that lease, transferred to the tenant a valuable interest in the property?

A. Yes; he has given away the profit, if any, in the lease for that period of time.

Q. And he has, therefore, depreciated a corresponding part, the fee title to the property? A. Yes.

Q. In arriving at that conclusion as applied to this particular piece of property, did you bear in mind that this was tideland? A. Yes, sir.

Q. And did you bear in mind the proposition that by the constitution and by the statutes the officials of National City were prohibited from transferring any interest or any part of the fee and that any transfer they would make, by which they would transfer any part of the fee, was void?

A. Do you mean unless they consented to it at a later time?

Q. Whether they consented to it or not, did you consider that?

A. I considered the statute, I believe the provision in it to which you have reference. And, in considering the value, we must also, in fairness, consider the value that it [732] had to the San Francisco Bridge Company in use.

Q. That is not what I am getting at. What I am getting at is whether you considered in arriving at that conclusion that the officials of National City are prohibited by law from making any agreement by which they would transfer any part of or any interest in the fee title?

A. Oh, in the fee title?

(Testimony of Ewart Goodwin)

Q. Yes. A. Yes.

Q. As a matter of fact, in determining that there is a bonus value because of the favorable terms of the lease, you have considered the property just the same as though it were owned by a private owner, have you not?

A. I don't know that you would say it was just the same. I certainly considered the San Francisco Bridge Company was in possession and had the benefits that would accrue from the remaining 18 years of the lease.

Q. In arriving at the conclusion that there was a bonus value by reason of the favorable terms of the lease, you have used the same figures and have arrived at the same conclusion as though the property were owned by a private owner?

A. I don't believe I would say I have 100 per cent done that because we don't have exactly the same set of facts. I would say I would have used certainly the same or a very similar approach in arriving at the conclusion. [733]

Q. In arriving at that conclusion, did you take into consideration the proposition that, if that lease contained a provision that, in case of condemnation, a portion, a percentage of the amount received for the property, should be paid to the San Francisco Bridge Company, such provision of the agreement would be void under the constitution and statutes of California?

A. Had it contained such a provision.

(Testimony of Ewart Goodwin)

Q. No. I am just asking you whether you considered that.

A. I would say that I considered it because there are many leases that do have a provision, that, in the event the leasehold interest, if any, shall be condemned, an amount shall be paid in that way.

Q. Did you consider such a proposition, that such an agreement would have been void in the case of tidelands?

A. No; I did not.

Q. In arriving at your valuation of the entire parcel, Mr. Goodwin, you capitalized what you took as the overall rental of the entire parcel, and then you proceed, as a matter of computation, to figure the amount of money which, invested at 7 per cent, would produce what you considered as the overall rental value? A. Yes, sir.

Q. Now, in arriving at that consideration, did you consider that in making these tideland leases the municipal [734] government takes into consideration the amount of taxes that they will receive from improvements that are going to be placed on the property?

A. No; I don't believe that that is possible to figure accurately.

Q. In other words, that is just something which, if eliminated, is a matter of bad luck for the City, is that right?

A. No; I wouldn't say so but it isn't susceptible of direct interpretation as to what the City might have done. It couldn't be said that, necessarily, it is bad luck. That would depend on whether in eliminating it the City got as sound a tenant in the second place as it had in the

(Testimony of Ewart Goodwin)

first place. It might be good luck. If the tenant that came along was sounder and paid salaries year in and year out, through periods of depression and otherwise, they might be better off.

Q. We are now speaking or dealing with the value upon taking and, if I get your answer correctly, you are eliminating from consideration the proposition that the City is deprived of any right to tax any improvement?

A. No; I considered the full picture as to what the City's rights were and were not.

Q. Now, let's go back to the question of the rental value. Do you consider the rental value that it had at [735] the time or do you consider it as an average rental that it would receive over a period of years in the future or that it would be entitled to receive?

A. As best I could estimate it, it was the rent at which the property might be rented, or rate at which the property might be rented, over the years that we could see ahead of us.

Q. In that connection, of course, you consider that this property, being vested in the City, is a matter of a permanent thing, is that right? A. Yes.

Q. And that it would continue to own and receive rents from the property from now on unless some superior authority took it from us, that the Russians took over or we gave it to the British or something? A. Yes.

Q. In arriving at your conclusion, have you borne in mind the constant growth of the city? A. Yes.

(Testimony of Ewart Goodwin)

Q. I mean starting back as far as you and I remember, back say for the last 40 years.

A. Yes. But, of course, in 40 years it wasn't very constant over the full period of time. The area had its ups and downs.

Q. I am talking about the entire community. [736]

A. The entire community of San Diego and National City, and San Diego in particular, has gone ahead and National City has gone ahead particularly since 1940.

Q. And, as we look back in 1900, National City and San Diego were both then nothing whatever in comparison to what they are now? A. That is right.

Q. And did you consider the probability that a certain amount of growth would continue? A. Yes; I did.

Q. And you have stated, of course, that the available tidelands in 1942 were pretty well occupied?

A. Yes; those that were directly available for use.

Q. Would you expect, then, Mr. Goodwin, that, as the years went along, the City of National City, if it retained its tideland, would be in position from time to time to receive gradually increasing rent for this property?

A. I would say they might but, on the other hand, there was no question in my mind—or, when you get your rent to a certain point, there were considerable lands that would come in, that would compete with those lands. It is one thing not to bring in any additional land when you have a three-months' rental but, when your rent goes up you can do a lot of dredging and filling and bringing in new lands, and over a period of years they might bring

(Testimony of Ewart Goodwin)

in lands in an area that might [737] not be as favorable to industry as they were before. There were some two miles below this area that would very definitely have come in and, in reaching my conclusion as to a fair rental, it is also quite possible that, as a result of a lot of the war activity, we were engaging in a period of profits and return and return that would not, necessarily, be sustained on the same level, over a period of 10, 15 or 20 years. To bring that to a head and interpret it in terms of value, we have only to consider the factor as that the value of recapturing this land was worth \$77,000 eighteen years from now. The present value of the recaptured land is only about 35 per cent of the value that it would have if it was immediately in pocket.

Q. How long from now are you talking about?

A. In that particular instance, 18 years.

Q. Well, of course, in dealing with the City, unless disturbed, it is a matter of hundreds and many hundreds of years?

A. Yes. But you have an increased factor so that you have got what you consider a reasonable rental value.

Q. And they capitalize that at 7 per cent—

A. Among other things.

Q. —for the whole area, is that right?

A. Yes; that is one of the tests and that is the test that I consider one of the most accurate. [738]

Q. That is the way that you arrive at the \$310,475, is by taking what you consider the reasonable rental value of the property and capitalizing it at 7 per cent?

A. That is one of the tests but it isn't the only test.

(Testimony of Ewart Goodwin)

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(Testimony of Ewart Goodwin) -

Q. That is how you got that particular figure, is it not?

A. It would come close to that; yes.

Q. So that in arriving at that figure, or taking it from that approach, you figure that that is the amount of money which, invested at 7 per cent, would produce that reasonable rental value?

A. It would approximate that; yes.

Q. And what would you recommend, Mr. Goodwin, that the City invest that money in to produce the 7 per cent of safe income?

A. There is no direct investment that they could make in the securities of other concerns or in bonds that would produce that. The City of National City has many things that it could use funds for, including bringing in of additional tideland areas, that would bring it still more income and bring more capital to the community. There are many things, recreation areas, that could be developed and make it a nicer place to live and bring more people there and have them build nicer homes, on which they could levy taxes. It [739] must also be considered, of course, that 7 per cent as expressed in a matter of this sort is not a pure interest rate. There is a possibility, as of 1942, and a good probability, that all of this land would not come into use for some years. The war had been on at that time. The government had been making acquisitions of land and there were still areas in National City, including part of the subject land, on which they were getting absolutely no income. There is a further factor, that the City can't get that income without taking on additional re-

(Testimony of Ewart Goodwin)

sponsibilities that cost them a lot of money, such as I have mentioned, the fire protection, police protection, the establishing of a harbor department and including in the city government salaried business men that are experienced, qualified and competent, to supervise the area and negotiate with prospective purchasers and renegotiate leases and the like. So it isn't a pure interest rate of calculation of a reinvestment setup.

Q. The answer as summed up, then, is that there isn't anything that you have in mind that they could invest in at 7 per cent?

A. Yes; if they brought in additional tidelands, and they got a return on a commensurate amount of money expended—they are in a beautiful position to do it because they just add the proposed dredging or the dredging that was accomplished or in process of being accomplished, down to the ex- [740] tension of Parcel 7.

Q. When you use 7 per cent, there isn't any rule or law that says you must use 7 per cent, is there?

A. No, sir; there isn't.

Q. And you use that because that is what you conclude is, in your opinion, fair as applied to this particular case?

A. Yes, sir.

Q. If, as a matter of fact, you used, for example, 3½ per cent and capitalized at that per cent, it would just double the figure, would it not?

A. Yes; but that wouldn't be justified in considering the cost—

(Testimony of Ewart Goodwin)

Q. If we capitalize it at $3\frac{1}{2}$ per cent, then the amount required to produce what you call a fair rental income would be \$620,900, would it not? Is that correct?

A. Yes. But, in my opinion, you would just be kidding yourself. A review of the expenses that the City of San Diego is up against and the cost in maintaining their harbor department and dividing it just wouldn't warrant an interest rate of that amount or a capitalization of that amount.

Q. What you have actually done, then, in arriving at this opinion is to take it as though what the City had was the right to collect the rent? You have then taken what you consider a fair rent and you have capitalized that?

A. Yes, sir; that is one of the things I did. [741]

Q. Now, let's suppose, for the sake of the question, that, in addition to that, the City had the actual fee and that could be sold to any party for any purpose. Would that give an additional value to your figures or not?

A. No; I don't think it would.

Q. What I am getting at, Mr. Goodwin, is let's suppose, for the sake of the argument, that this piece of land between the high tideline and extending out into the water to the pierhead line was owned by a private owner, and he came to you and asked you to find him a purchaser, a purchaser that he could convey the fee and sell it for any purpose and use it for any purpose. What do you think you could get for it?

A. I would say it would be a similar amount.

Q. You wouldn't give any added value to that?

A. Do you mean because he was a private owner?

(Testimony of Ewart Goodwin)

Q. Because he was getting the entire fee title.

A. No. That is what would be contemplated in either event.

Q. That is what you would contemplate, then?

A. That is what would be contemplated, in my opinion.

Q. Let's back up a minute. I think you said you were detracting somewhat from the value because the San Francisco Bridge Company lease cut the property up.

A. Yes.

Q. Were you considering that the sale that you were [742] going to make was made of the parcel without the San Francisco Bridge Company parcel?

A. No. The sale that would be made would be of the entire area that we are considering here, subject to the same prior commitments or responsibilities that would have to be carried out by the prospective purchaser, that had been assumed by the owner in the first instance.

Q. You understand, do you not, Mr. Goodwin, that in this particular proceeding the United States Government is taking the entire parcel, its entire title?

A. Yes.

Q. And they take the interest of the San Francisco Bridge Company and the City of National City and of the State of California, and, if anybody else has got any lease on any part of it, no matter what those interests are, they are being taken, is that correct?

A. Yes, sir.

Q. Then, they get the entire parcel in fee and no lease divides anything up at all, does it?

A. Not after they condemn it; no.

(Testimony of Ewart Goodwin)

Q. That is what they get and that is what they should be paid for, is that not correct?

A. No. They are entitled to the highest price, in terms of money, that any other well-informed buyer would pay for the same parcel of property. [743]

Q. Let's assume, then, that any well-informed buyer is buying this piece of land and that the sale is being made and joined in by everybody who has got any interest in it whatsoever. A. Yes.

Q. You wouldn't allow anything or decrease it any because of the existence of a lease, under those circumstances, would you?

A. Yes; it affects the value of the property, that is, the lease existing, the value of the entire property in so much as it interferes with its use as a whole at this time.

Q. Even though the entire property and the entire interest is being sold to the purchaser?

A. Well, it is still subject to the conditions that exist on the property at the time.

Q. You persist, Mr. Goodwin, in assuming that the property is being sold subject to a lease, do you not?

A. No—well—no, not that it is being sold in this particular instance subject to a lease, but in arriving at the opinion of fair market value we must consider the leases that exist on the property. Now, the fact, as I would view it that there is a lease on Parcel 7 that is disposed of and out of the way is the reason that the San Francisco Bridge Company, you might say, in fairness and equity, comes in for the amount that they do. [744]

(Testimony of Ewart Goodwin)

Q. Then, I may fairly assume, may I not, that in arriving at your valuation of the entire tract you give less value to the entire tract because of the existence of the San Francisco Bridge Company lease? A. Yes.

The Court: We will take our recess now, ladies and gentlemen, for a few minutes. Remember the admonition heretofore given you.

(Short recess.) [745]

The Court: I think you may proceed, Mr. Monroe.

Mr. Monroe: Tha is all.

The Court: Now, Mr. Muir, you are going to cross-examine on behalf of the Johnsons as to parcel 9?

Mr. Muir: Yes, I would like to, your Honor.

Cross-Examination

By Mr. Muir:

Q. Can you tell us, Mr. Goodwin when you were first retained to make an appraisal of all of this property?

A. That matter was first discussed with me in January of 1942. So far as being officially contacted with, to do the job, it was in the spring of '43.

Q. Were you involved in the setting of the figures for the amounts of estimate made in connection with the declaration of taking?

A. That I don't know.

The Court: You will have to raise your voice now, Mr. Goodwin, and also Mr. Muir. I see there is some action in the air that is creating noise.

(Testimony of Ewart Goodwin)

The Witness: I don't know whether the figures I had anything to do with were used in the original statement of taking or not.

Q. By Mr. Muir: Now, in arriving at your opinion of the values you have given us today, you talked with numerous persons; is that correct? [746]

A. Yes.

Q. Are the values you give us now the same as those you gave or had in 1942 and '43?

A. Yes, they are.

Q. Did you consider in making or giving your opinion today of the various values of these properties any of the factors that occurred or facts which occurred subsequent to 1942?

A. No, I could only consider in November, 1942, at the time I was making my appraisals, those factors which I found were in motion that would result in trends or effects and that would affect my opinion of value.

Q. Well, you referred to certain sales and you gave us two; one in April, 1942 and one occurring in October, 1942.

A. I considered all the sales with which I was cognizant. We searched the records. I considered all the sales and listings we had in our files and then we searched the records for data relative to other sales, and all those I could find we considered.

(Testimony of Ewart Goodwin)

Q. You used the records in your own office, your own business office?

A. Yes. Then we also had a check through title company records as to certain sales and considered those that we felt were comparable. [747]

Q. In other words, you didn't check all sales for the area or of property in that vicinity which would comparable?

A. We checked all that we could find. Sometimes there are properties sold under contract of sale where title is not brought down until a later date, and it is not possible—

Q. Did you consider a sale for \$49,000—

Mr. Landrum: Just a moment. If the court please, that is objected to, first, upon the ground and for the reason that there is no showing that it is comparable property, and it is indefinite as to time. I feel if the witness knows the sale, he can cross-examine, but to ask the question and to state the figure at this time I think is improper.

The Court: He did not get a chance to state anything. He hasn't stated the other factors which perhaps are more informative than the price.

Mr. Muir: That is what I had in mind to state.

The Court: State all the facts and the time.

Q. By Mr. Muir: Mr. Goodwin, did you take into consideration in making up your opinion here of the value of these properties a sale which occurred on March 2, 1942 for a consideration of \$49,000; the seller, the San Diego and Arizona Eastern Railway Company; the buyer, San Diego Gas & Electric Company; covering the prop-

(Testimony of Ewart Goodwin)

erty known as Newton Street west of 16th Street, north of the San Diego and Arizona Eastern Railroad Company and the tidelands, and east [748] of waterway, 42 feet open drain. Did you consider that sale?

A. Yes, I did.

Q. How much property was involved in that sale?

A. Will you give me the legal again?

Q. All I have is Newton Street west of 16th Street, north of the San Diego and Arizona Railroad tracks.

A. That is all the information you have on it?

Q. And the date of sale is March 2, 1942, and the improvements are none.

A. Let me see. Newton Street,—west of Newton?

Q. West of 16th Street.

A. Yes, I considered that sale. That was in the—

Q. I asked you what the area was?

A. The area was five and three-quarter acres.

Q. And the price was \$49,000?

A. Yes. I might also state that was in the downtown area of San Diego, and that the purchaser received as a further consideration for the purchase price a lease on a portion of land adjoining the purchase, of which I have a diagram.

Q. Perhaps we have the same ones here. That is shown as your No. 1 sale?

A. No, I think that is shown—

Q. Referring to your index? [749]

A. —as 4-A.

(Testimony of Ewart Goodwin)

Q. In other words, in your remarks you made the same remark as I have, that the purchaser also received—

A. Well, that is logical.

Q. Now, do you have a sale listed as No. 3, at a price of \$3,600, being the southwesterly side of Main Street between Sigsbee and Beardsley, and the legal being Lots 35 to 39, Block 84, Manassee and Shiller Subdivision, plus a part of railway right-of-way?

A. Who were the buyers and sellers?

Q. The seller was the San Diego and Arizona Eastern Railway and the buyer was the Crowe Transport Company.

A. Yes. That was in San Diego, situated on Main Street, which is between Sigsbee and Beardsley, on the westerly side of Main.

Q. Did the area in that instance amount to .45 of an acre?

A. Yes; 20,000 square feet in that parcel.

Q. And the price was \$3,600? A. Yes.

Q. Or figured out at \$7,841 per acre cost,—correct?

A. I assume that is the way it would be extended.

Q. Eighteen cents per square foot and 20,000 square feet?

A. I know that property is not comparable to the [750] property under consideration.

Q. It is not? A. No.

Q. Why?

A. Well, it was on a paved street close to the downtown part of San Diego, and an area that was—had a comparatively small amount of vacant land available for

(Testimony of Ewart Goodwin)

purchase, not similar to an area in an industrial part of National City where four-fifths of the industrial land was unimproved.

Q. Well, it was situated near the industrial area in San Diego? In fact, it was right in the industrial area?

A. Yes, it was what you might call in the industrial area, although it was a wholesale-retail area. The people that are interested in buying there were wholesalers serving the San Diego district, that wanted to be close to the people they had to supply by truck every day, and under those conditions it was necessary to pay a higher price or a premium to be right close to the downtown district.

Q. Well, these parcels are near the National City downtown district?

A. Yes, but without anywhere near the same demand and potential. It was also on the main road to National City and the entire South Bay district. There are certain advertising advantages to the particular location.

Q. You mentioned that one of the advantages of the [751] San Diego property referred to was the fact that it bordered on a paved street, and I understood you to say that there was quite a bit of value to property that bordered on the water, tideland property. That property of Mr. Johnson's was right adjacent to the tidelands, was it not?

A. Yes, it was near the tidelands property.

Q. In fact, he had a pipeline that ran across the tracks and out into the harbor, an oil pipeline that ran into his property? That is of quite some value, isn't it?

A. It certainly is a consideration in the value of it.

(Testimony of Ewart Goodwin)

Q. In other words, if Mr. Johnson had put this property to use for a bulk plant for the distribution of gasoline products, that pipeline, if he wanted to bring the oil or gasoline in by boat, would have been of quite some value, wouldn't it? A. When?

Q. Back in 1942.

A. Well, not as a final and conclusive factor because that was no location for that type of business in 1942.

Q. Why? Why not?

A. Because of the dust and the unfavorable conditions immediately surrounding it, for that particular use.

Q. You mean dust created by the Tavares Construction Company in the operation of the concrete shipyards? [752]

A. That, and the area adjoining it, and this area where the batch plant was.

Q. I would like for you to consider the property without any shipyard being there at all. In other words, are you considering, Mr. Goodwin, Mr. Johnson's property being of less value because the shipyard went in there and there was a lot of cement dust?

A. No, there were advantages and disadvantages. They weren't all advantages.

Q. In other words, you just mentioned it detracted from the value of his property because of the fact there was a cement plant there?

A. For the particular purpose that you mentioned.

(Testimony of Ewart Goodwin)

Q. Are there any other purposes of use that the cement plant would have detracted from

A. Other uses where the existence of dust and the like would be objectionable, yes.

Q. Well, at the time Mr. Johnson's title was taken, on November 10, 1942, there wasn't any plant on his land that created dust, was there

A. Not on his property, no, but I am quite sure there was there.

Q. Well, in 1942 it wasn't on his property?

A. I am not positive as to the exact location at that particular time. [753]

Q. Well, give us approximately where you think it was.

A. I don't—I am not sure that the batching plant was then in operation, at that particular time. There were heavy construction operations going on and lots of dust flying, and the—

Q. You don't mean to imply possibly all these structures were put on the property before they even took the title or started to condemn?

A. I don't know. That is quite possible.

Q. In other words, the government just moved in and took possession, and later on filed a condemnation suit?

A. No, they often did that under a use permit obtained from the owners.

Q. You don't know of any use permit in this case, involving any of these properties, do you?

A. No, I don't.

(Testimony of Ewart Goodwin)

Q. In other words, to summarize this, this property referred to here of .45 of an acre in the wholesale business district, the wholesale industrial section of San Diego, is not comparable to the industrial area in National City?

A. I would say it isn't at all comparable as to value.

Q. That is just your declared opinion?

A. Yes, it is based on an analysis of sales and listings throughout the entire area. It is more comparable to the value of property south of 32nd Street in San Diego, although [754] even the properties in National City were not bringing as high a value as they were in the City of San Diego, as high a price.

Q. Each property referred to had a railroad track running alongside of it; is that correct?

A. Yes, I believe that's correct.

Q. So they were similar in that regard?

A. That's correct.

Q. Would you say that the southwesterly side of Main Street between Beardsley and Crosley was somewhat comparable to Mr. Johnson's property?

A. No, I would not.

Q. Why not? It is getting down pretty close there, is it not?

A. No, that is just a half block closer than the property you mentioned previously.

Q. How many miles away is that from parcel 9?

A. Oh, I would estimate that is about three to three and a half miles from parcel 9.

(Testimony of Ewart Goodwin)

Q. Well, in arriving at your valuation here, you referred to property a couple of miles or three miles away, didn't you?

A. No, the property to which I particularly referred—

Q. I am talking about those tideland leases. They were as much as five, six and eight miles away, weren't they? [755]

A. That was by way of comparing the areas on the tidelands and with immediate access to the water.

Q. Well, you wouldn't say that three miles from a designated point, both points being in an industrial area, is so disrelated that the values could not be compared?

A. Yes, because industrial lands are often sold for various purposes. The San Diego Consolidated Gas & Electric Company, for example, bought the parcel to which you referred, in my opinion, for a special use, and they needed property in a certain location.

Q. Well, now, if I may interrupt you at that point: the United States government, in a way of speaking, is buying this property for a designated purpose, and, therefore, that would be of considerable value, too?

Mr. Landrum: Just a moment. If the court please, that is objected to on the ground it is incompetent and immaterial what the government was buying it for.

The Court: Yes. It is not the enhancement to the government or its peculiar value to the condemnor. It is the loss to the property owner of the property taken that is the basis for the valuation.

(Testimony of Ewart Goodwin)

Q. By Mr. Muir: How many square feet are there in this property of Mr. Johnson's and his wife?

A. There was 1.2 acres. That would be about 44 or 45 thousand square feet. [756]

Q. Did you take into consideration in arriving at your opinion of value the improvements upon the property?

A. Yes, I did.

Q. What improvements were those?

A. The improvements on the property consisted of a small building that would be suitable for a field office, tool building, storage shed; a 15 by 30 foot corrugated sheath on a slab floor.

Q. Well, what do you think that building was worth?

A. Well, I believed that the existence of the building on the property would have enhanced the value of the property over what it would otherwise have been by \$250.

Q. In this particular instance though it might have been a detriment to the buyers, in that they might have had to remove the building, and did you take that into consideration?

A. I considered the fact that the building was there and the extent to which, in my opinion, it enhanced the value of the property.

Q. I want to direct your attention to Plaintiff's Exhibit 1, parcel 9, being a sort of a square with a neck extending down to the south, and which I think was referred to here as a ramp. Would you say that the fact that the government took that portion of the ramp through the south half of Mr. Johnson's property detracted from what remained [757] in the Johnsons, that is, the prop-

(Testimony of Ewart Goodwin)

erty here which is shown immediately to the south of parcel 9?

A. No, I don't believe that it detracted.

Q. So you know, as a matter of fact, the ramp divided up the property that remained in the Johnsons?

A. Yes.

Q. It didn't detract from that property, though?

A. No. In my opinion, it was much the same as though an alley had existed on the property and the remainder was still susceptible of use.

Q. In the case of an alley, it is dedicated to public use. This is a ramp on private property, exclusively for the use of the United States, and that would not give any use in the Johnsons in using the property that was so divided, would it?

A. It wouldn't, but the bulk of sales in National City were of property similar to the property that remained, and it was not carved out in any disproportionate manner by the existence of the finger that extended out. [758]

Q. By Mr. Muir: How far away from Parcel 9 was this property in National City that you referred to?

A. There were various smaller parcels, in National City, 50 by 125, 65 by 125 or 115.

Q. Where were they located, Mr. Goodwin?

A. In various areas both north and south of the subject property.

Q. Were they adjacent to the tidelands?

A. Not immediately adjacent to the tidelands.

Q. How far back were they?

A. Oh, three or four hundred feet.

(Testimony of Ewart Goodwin)

Q. They were not in the immediate vicinity at all, in other words?

A. Well, within two or three blocks.

Q. Would you say to the east?

A. South and east and some to the north.

Q. To the south there isn't very much more property that borders on the tidelands privately-owned, is there?

A. No.

Q. Then, it must have been to the east; not to the south?

A. No. There is additional property that borders on tidelands, just as the parcel immediately to the north did.

Q. But to the south there is nothing, is there?

A. Yes. [759]

Q. Perhaps one block and that is all?

A. No. there are, speaking from memory, I would say several hundred acres.

Q. Tidelands property?

A. No; not all tidelands; adjacent to the tidelands. I believe that the Santa Fe Railroad has at lease several hundred acres in that category.

Q. You said that you considered a sale by the Santa Fe in arriving at your opinion as to what you should say here as to the value of Mr. and Mrs. Johnson's property. Was that the property that was condemned by the United States in this proceeding, in which they sold to the government after the institution of these proceedings?

A. No; I didn't say that I considered any sale of the Santa Fe, I don't believe.

(Testimony of Ewart Goodwin)

Q. I noted, Mr. Goodwin, that you indicated four factors in arriving at your opinion, sales of other property, the large amount of other vacant property in National City, Santa Fe sale of property and lease with Tavares.

A. No; I think I said the Santa Fe listing.

Q. Was that a listing in your office? Do you mean a real estate listing? A. Yes, sir.

Q. That was furnished to you by the Santa Fe?

A. That is right, at my request, in connecton with [760] other work we had done for the Santa Fe, but not for the Santa Fe of other work we had done in condemnation proceedings.

Q. You mentioned that you considered the lease with Tavares, that was made by Mr. and Mrs. Johnson, in arriving at your opinion? Did I understand you correctly?

A. Yes.

Q. And you understood in so considering it that it was a lease at the rate of \$40 a month, to run for five years, with an option to renew it for another five years?

A. That is right.

Q. The rental on this lease for the term of five years was \$4,125, is that correct? A. No.

Q. How much was the total?

A. I would have to multiply it out for five years.

Q. \$480 a year?

A. Well, say, if it was \$500 for five years, it would be \$2500. It would be somewhat less than \$2500.

Q. In making an analogy between the National City property and the San Francisco Bridge Company lease,

(Testimony of Ewart Goodwin)

I would assume you would say about the Johnson property that the lease with Tavares was a detriment to the Johnsons in having this lease with Tavares at the time of taking? In other words, in arriving at the value you would give the Johnsons for their property, you would take this Tavares lease value? [761] A. No.

Q. You would not? A. No.

Q. Did you consider in arriving at your opinion that the Johnsons suffered a detriment in losing the rental under the Tavares lease of \$40 a month for five years?

A. Yes.

Q. That would be a detriment of about how much?

Mr. Landrum: Just a moment, if the court please. That is objected to as incompetent. The question of fair market value does not include any loss of lease. That question was before your Honor, as you recall.

The Court: The way the question is framed, it includes a factor that he took into consideration. The government took the fee and took everything, including the income and the possibility of potentialities. The objection is overruled.

The Witness: Will you repeat the question again?

(Question read by reporter.)

The Witness: I did not attempt to figure it as to an exact amount of detriment that they had suffered.

Q. By Mr. Muir: In reference to your testimony about National City's fee title and the San Francisco

(Testimony of Ewart Goodwin)

Bridge Company lease, you figured that accurately to the dollar, as I understood your testimony?

A. That was, in my opinion, an entirely different situ- [762] ation; that they had created certain items of value as a result of their effort. They had obtained a favorable lease. I can't understand why one would have paid \$40 a month for this particular parcel of property.

Q. May I ask you if you were one of the government appraisers that set the value of the property and fixed a rental therefor in connection with the making of the Tavares lease with the Johnsons? A. No.

Q. You were not? A. No.

Q. Are you familiar with the government's practice of capitalizing the property in arriving at the rental to be paid?

A. Yes; I believe I know what you mean. I am familiar with the process that is followed. Do you mean when it comes to going out and appraising a given parcel of land and placing on the parcel of land the value—placing the value of the parcel or the fee and then placing the amount of rent that you feel is the fair rental value?

Q. If you use your theory of 7 per cent in arriving at a capitalization value in regard to the Johnson's property and a rate of \$40 a month rental, it would have to be 15 or 16 per cent return to arrive at the true value, wouldn't it? Would that be about right? [763]

A. Yes; if you used that same procedure, or the properties and the conditions are not favorable. On the one hand, we have a favorable lease, but, on the other hand, we have, in my opinion, an amount of money here which

(Testimony of Ewart Goodwin)

was quite high or excessive. There is nothing else like it. The parcel immediately to the north is rented for much less money to the same people.

Q. May I ask if you took into consideration in arriving at your opinion the lease between the Johnsons and Carl Bliss that was made out at \$100 a month for this property and it was paid for two months prior to the execution of the Tavares lease on June 5, 1942?

A. Yes; I knew of that lease but that lease was not in effect at the time or on the date of our valuation and there were, as I understand it, certain other matters involved, certain other improvements on an additional portion of property. They covered not only this property but certain additional property.

Q. I understood you to say you considered it?

A. Yes.

Q. And you considered the fact that the Johnsons were getting \$100 a month rent from Carl Bliss? You considered that fact in arriving at your opinion?

A. Yes; for this and other property.

Q. And you also considered the lease which was later entered into between Carl Bliss and the Johnstons about that [764] same time as the Tavares? In other words, Mr. Bliss relinquished his previous lease and Tavares and Bliss took separate leases of separate portions, about June, 1942? You were familiar with that, too?

A. Yes.

Q. You were familiar with the fact that Mr. and Mrs. Johnson were getting \$35 a month rent on the Bliss land at the time they got \$40 a month from the Tavares people?

A. Yes.

(Testimony of Ewart Goodwin)

Q. You considered those factors?

A. Yes, sir.

Q. And you considered that property bringing in \$75 a month on fixed leases for a definite period of at least five years, and possibly 10,—that \$75 a month was worth just \$2500, is that your opinion?

A. No; that is not my opinion. And that wasn't the condition, either.

Q. In other words, property worth \$2500 in this instance was bringing in \$75 a month income?

A. No, that involved additional property.

Q. What additional area to the south of the subject property when you say additional area?

A. I believe it was about 60 or 70 per cent of an acre, 7/10 of an acre say, or 6/10 of an acre. [765]

Q. Is that any of the property that Mr. Haas bought from the Johnsons?

A. Yes. But that included on it at that time an office, a storage building and a garage building.

Q. By the way, I noted in your testimony that you stated that in regard to one of these other pieces of property that had been sold, that is, a sale, you considered in arriving at your opinion of the Johnsons' value part of this other property was marsh land, is that correct?

A. Yes; one-quarter of it.

Q. Was that property that the sewer was emptying into from other adjoining properties? A. No.

Q. Was that property owned by the Santa Fe Railway?

A. No. That property had been owned by George Johnson of National City.

(Testimony of Ewart Goodwin)

Q. That is the portion that had the marsh land on it, is that right?

A. Yes; that marsh land and also some very good land.

Q. In other words, the good land was solid earth like the Johnson's property?

A. Yes.

Q. I presume you also considered in arriving at your opinion this sale by Johnson to Haas for \$7,000? You considered that? [766]

A. No; that sale had not been made at the time of my appraisal.

Q. In giving your opinion now at this time, you are cognizant of that fact, are you not, that the Haas people bought from the Johnsons this property to the south, divided by the ramp, for \$7,000 cash?

A. Including the improvements thereon, which consisted of an office, a storage building and a garage building.

Q. Was that any of the property you described as being on Parcel 9 when I asked you once before?

A. No. This was on the other property. There was also a small structure on that Parcel 9.

Q. Were those improvements quite as valuable as compared to the \$250 of improvements on Parcel 9?

A. Yes.

Q. What were they worth?

A. I don't recall the exact detail of the improvements to the extent that I think it would be fair to give an opinion as to their value. I would say in excess, however, of \$2,000.

Q. If you would say \$2,000, you must know what kind of a building you are talking about.

(Testimony of Ewart Goodwin)

A. Yes, but there is a lot of difference in saying in excess of \$2,000 and figuring out a quantitative analysis of [767] the building.

Q. You having now fixed a value of \$2,000—

A. I haven't fixed that value.

Q. —or in excess thereof, for the buildings on the property of the Haas', please describe those buildings?

Mr. Landrum: As I understand it, the sale which counsel refers to took place subsequent to November 10, 1942. It would have been impossible for a buyer to know what that sale would be, and we object to it.

Mr. Muir: I think this is proper upon cross examination as going to the truth and veracity of the witness and his extent of memory.

The Court: It seems to me this is an immaterial matter. If we are restricted, as we are, to a certain date for the purpose of ascertaining the value of the property, I think it would be immaterial as to what an appraiser or an evaluator may think as to sales made subsequent. If sales were made subsequent, they couldn't be within the mind of the evaluator unless an investigation were proceeding at the time that involved the details of this property. The objection is sustained. Mr. Muir, if this is going to take some little time, we will take a recess now.

Mr. Muir: I will have a few more questions.

The Court: We will take a recess now until 2:00 o'clock, ladies and gentlemen of the jury. Remember the [768] admonition heretofore given you and keep its terms inviolate.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.) [769]

San Diego, California, Monday, February 24, 1947.

2:00 P. M.

The Court: All present. Proceed.

EWART GOODWIN,

called as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination (Continued)

By Mr. Muir:

Q. Mr. Goodwin, in regard to evaluation of property, when there is a leasehold interest outstanding, that is, an owner has leased the property to somebody, did I understand you to say that in computing the value of the fee you would take into consideration the value of such outstanding lease? A. Yes.

Q. That is, when an owner gives a lease, he gives away the profits of the land for the term of the lease?

A. Yes, in fact, he does.

Q. That was your testimony this morning, also, was it not? A. Yes, sir.

Q. So that, in other words, in the case of the Johnsons, when they entered into these leases with Bliss and Tavares, they had a total rental of approximately \$4,100 coming in, and by your statement they gave away, when they executed [770] those leases, they gave away the profits for that period, amounting to that amount of money; is that right? A. No.

Q. They did not?

A. We were concerned there with a lease that had a little less than five years to go, bringing in \$40 a month. That was a higher rental than any other rentals I knew of

(Testimony of Ewart Goodwin)

in the same area of comparable property, of which there was an adequate supply, and that would not equal the amount you mentioned.

Q. But doesn't our definition and the operation of your opinion work in all cases, or is this just an exception?

A. Here we are valuing the property for the leasehold and for the period that Tavares had obligated themselves to continue paying rent at the same basis it had a period of a little less than five years to run.

Q. Just confining ourselves to the Johnsons' lease with Tavares, then you would say that during the time of the Tavares lease, which was a little less than five years, the Johnsons for that period had given away the profits of their land, for that period?

A. That is correct. The rate that they were getting was, however, in my opinion a substantial one. It was paid to them based on a particular need, apparently, of a concern for this particular piece of property, and is not, in my [771] opinion, a proper gauge of the fair market value of property, as the definition applies in California.

Q. Then this land of the Johnsons was particularly valuable by reason of the fact that it was so located, then?

A. It happened to have a particular use for the Tavares Construction Company, that is correct, but that does not mean, I don't believe, that we must give consideration in valuing this property to a lease on a given piece of property that is out of proportion to leases paid for other similar pieces of property. [772]

Q. By Mr. Muir: Leaving out of the matter the argument on the amount of the rental, nevertheless, you would say, would you not, that, when the Johnsons made

(Testimony of Ewart Goodwin)

their lease with Tavares, they lost the profits for the term of that lease?

Mr. Landrum: Just a moment. If the court please, I am going to have to object to that as immaterial. We are taking fee title here.

The Court: He is trying to arrive at factors which, according to counsel's hypothesis, should enter into the market value of the property at the time it was taken. He and the witness haven't been able to agree upon those factors. Overruled.

The Witness: What is the question?

The Court: Read it.

(Question read by reporter.)

The Witness: I question if that is what counsel meant to ask, "when they made the lease with Tavares that they lost their profits of the lease."

Q. By Mr. Muir: From the land.

A. When they made the lease with Tavares?

Q. Yes.

A. They gave up the land and the use of the land to the Tavares Construction Company but, when they made the lease to Tavares, I don't see where it would follow at that [773] point they lost the profits from the land. They transferred the possibility of making a profit on the land from themselves to Tavares.

Q. I would like to ask you what percentage in this capitalization you would use in respect to just the Johnsons' property. You spoke about 7 per cent as being about right for the City of National City in arriving at your evaluation, and I asked you if 7 per cent fit the

(Testimony of Ewart Goodwin)

Johnsons' and you said that was entirely different. Now, what percentage do you place on it?

A. In the first place, it was entirely different because it was an isolated example of a rental being paid that wasn't comparable to any other rentals. As far as—I forget the last part of your question.

The Court: Read it.

(Latter part of question read by reporter.)

The Witness: I did not place an exact percentage on it. It would actually be much higher than 7 per cent because, when anyone is receiving a return out of proportion to other returns, it is always subject to risk of the lessee taking advantage of any circumstance that would come up to get himself in more favorable position when he is paying above the market for a given piece of property. And you would figure in any interest rate, there being two primary items that make up an interest rate, one, the service charge [774] for the use of the money and the other the risk involved, there is greater risk in the return on your capital when you are getting a return that is disproportionate to the return of other people and, therefore, what was a much higher rate of interest.

Q. By Mr. Muir: Then, if Mr. Tavares had agreed to pay \$200 a month rental, the risk to the Johnsons would have been increased proportionately and the value of their lease would have gone down proportionately?

A. No. The rate at which you would capitalize it, if the rental is in line with other rentals being paid, is much more conservative or much lower than if you are getting a rental that is out of proportion with rents that are being paid for similar types of properties in the same general area.

(Testimony of Ewart Goodwin)

Q. Well, would you say about 15 per cent would be a fair return on the capitalized value of the Johnson property?

A. A range of 15 to 20 per cent.

Q. That is what he should get back in rental, then, would you say?

A. Yes.

Q. One thing further. You said that you considered in arriving at your opinion of the values of all these parcels of land the labor situation in this area. What has that got to do with the Johnson property?

A. The labor situation, both as to the adequacy of pay [775] of labor, the adequacy of supply of labor, the working conditions under which labor can function, and the degree of efficiency they can use and bring to play in a certain area, has a bearing upon the value of industrial property in that area. In other words, if you have a supply of industrial property and there was no labor to work and produce money from their labors, the value of the property couldn't be very considerable.

Q. If this were used for a bulkhead plant or oil petroleum distribution plant, there wouldn't be very many men employed, or involved, would there?

A. Yes; but the value of the property for a bulkhead plant would depend upon the use of other concerns, wholesalers and manufactureres, in the community, for what would be sold by the bulkhead plant.

Q. What does an oil petroleum plant sell other than gasoline, kerosene and oils?

A. That is all they sell but they sell to people who must be engaged in labor in a given area, who produce the money to buy the gasoline, whether they are working men or anyone else living in that area.

(Testimony of Ewart Goodwin)

Q. Isn't a bulkhead plant usually built up on the amount of gasoline they control in gallonage? That is to say, if a bulkhead plant can distribute three or four hundred thousand gallons per month, the bulkhead plant must be big [776] enough to take care of that, must it not?

A. That is right; yes.

Q. And that would be a mechanized operation, and, except for truck drivers and a few odd personnel, labor wouldn't come into play in that regard for that particular use of this property?

A. No, only to the extent that they were engaged in competition with other people for labor.

Q. It would be a rather limited field?

A. Yes; it is not—

Q. Anybody with a chauffeur's license could get a job as a truck driver? A. I would assume so; yes.

Q. In arriving at your value, would you say that possibly \$2,000 might be a fair value for the Johnsons' property just as well as \$2500?

A. No; it was not my opinion.

Q. Is your opinion right on the dollar, \$2500, no more and no less? A. That was my opinion; yes, sir.

Q. It couldn't be \$2501 or \$2499?

A. That wasn't the conclusion I reached.

Q. If you are so precise, then, exactly upon what basis did you compute exactly \$2,500?

A. I computed the value of that property at \$2,500 [777] after considering—did you want to break it down and analyze the other sales?

(Testimony of Ewart Goodwin)

Q. No. Break it down as to what Mr. Johnson and his wife owned that you people put an added figure on of \$2500. What did they have that amounted to that?

A. They had an acre and two one-hundredths of land, with a small storage shed, as I have said, located in the City of National City, and that was comparable to other lands also in the City of National City, that had sold at a price that, in my opinion, was definitely comparable with the value that I have put upon their property.

Q. Across Harrison Street you place a greater value upon that land, don't you, than you do on the Johnsons'? It is more valuable?

A. Do you mean to the west of the Johnson property?

Q. Yes; across the street.

A. No. Directly across the street, on the area that was leased to Tavares, yes. Across the street and down into Parcel 3, as to the rear portion of Parcel 3, no.

Mr. Muir: That is all.

By Mr. Sloane:

Q. If your Honor please, Mr. Goodwin, I want you to deal solely with the San Francisco lease and the lands and areas covered by the San Francisco lease. [778]

I take it that, being an expert appraiser, you are able to visualize and deal with that lease as it existed November 10, 1942?

A. Yes, sir.

Q. Entirely apart from who owned the fee or what would happen to this land in future times? Is that true?

A. Yes.

Q. In other words, as I understand it, the lease and the leasehold rights under it had a definite value in November, 1942?

A. Yes.

(Testimony of Ewart Goodwin)

Q. That may or may not be in an up or down proportion to what the owner of the fee may have had of the lease? A. I don't understand. [779]

Q. What I want to make sure is that you were asked to pick out the lease and forget about these other people. Can we do that?

A. Yes, I think so except that, of course, in that we can't forget the City of National City, so far as being the owner of the fee and the others to whom the property would come at the end.

Q. That is true, but I am talking about the value. It doesn't make any difference, so far as fixing the value is concerned, it doesn't make any difference whether the City of National City owned the fee or whether I owned it? A. That is correct.

Q. Now, going back to 1942, let me make sure that we understand each other. On the basis of your testimony already given, it was your understanding that the City of National City had the right of occupancy of 6.26 acres of what we call shoreland? A. Yes.

Q. And that is the area marked in blue?

A. Yes.

Q. And that they also had rights given to them under the lease in the water area immediately adjoining and filling out the parallelogram? A. Yes.

Q. I take it that in fixing the value of the lease, we [780] are interested, first, in the physical characterization of the ground and the water, of the location relative to other lands, and of the adaptability to different uses, having in mind the highest and best use? A. Yes.

Q. We should also have in mind the terms of the particular lease, as compared to other leases, ordinary leases; is that correct? A. Yes.

(Testimony of Ewart Goodwin)

Mr. Sloane: The National City lease has been received in evidence here and is marked Exhibit L. I wish to examine the witness concerning that. Your Honor, may I have permission to give to the jury copies of that lease?

The Court: Yes, sir.

Mr. Sloane: And in case you don't have one, I will furnish you with a copy.

Q. By Mr. Sloane: Taking up, first, the general characteristics of this particular piece of land, how would you say this parcel 7 compares in lease value, use value, with parcel No. 2, for example, which is the yellow parcel on the plat?

A. I believe it is considerably more valuable than parcel No. 2.

Q. Now, when you are speaking of the value, you mean the rental value? [781]

A. Yes.

Q. How would the rental value compare as of that date, in your estimation? Is parcel 7 worth twice as much, three times, or what figure would you place on it?

A. I would say that parcel 7 would be worth probably four times as much.

Q. And what is the reason for that difference in valuation?

A. Because it had direct access to water that was dredged out to a depth that would admit the shallower draft boats, the barges, and the like, and to a certain extent control that much of the water frontage.

Q. With regard to parcel 3, which is the blue area, would that be two, three or four times as much in rental value, referring to parcel 7?

A. Well, it would be, to use round figures, and not having worked it out how many times more, I would say it certainly would be two or three times.

(Testimony of Ewart Goodwin)

Q. Is it fair to say three times?

A. I am not sure that it would be fair to say three; somewhere between two and three times.

Q. Suppose we compromise, in order to have a figure, and say two and a half times?

A. Well, that is up to you. You are asking questions that are a little difficult. [782]

Q. These questions are very general. Now, in regard to a comparison to parcel 1, how would you say that 18 acres in parcel 1, the red portion, compares in rental value with the acreage in parcel 7?

A. Considering the condition of the water area immediately in front of parcel 7, and considering the ratio of the water frontage that is controlled as compared to depth, it would be considerably more valuable than parcel 1.

Q. Can you give us a rough comparative value? Would it be twice as much, or three times?

A. I believe it would be approximately twice as much.

Q. What was the condition of the water area west of parcel 1 in November, 1942?

A. Well, the condition of the water area west of parcel 1 was a varying depth of about two feet above the lower low water to five feet; some places six, seven, nine, ten and up to sixteen; even over twenty feet as it approached the extreme westerly portion of parcel A.

Q. Then the westerly portion of it was the natural depth of the water, where the natural channel existed?

A. Approximately. Possibly not to the same depth as the channel itself.

Q. From there on shoreward it ran up into graduating depths, getting shallower and shallower until it was three

(Testimony of Ewart Goodwin)

or four feet, going to where it is marked as the bulk-head [783] line? A. Yes, two to four feet.

Q. In other words, to put it into other terms, a boat drawing ten feet at low tide could get in along parcel 7 right along the shore line, but could not get right up to parcel 1?

A. That's right, could not get right up to parcel 1.

Q. Let me see if I made a correct note of the valuation which you gave to the San Francisco leasehold. Is the figure on the total value \$45,750?

A. Yes, sir, as I remember it.

Q. Did I understand you to say that that was the value which you placed on parcel 7, exclusive of any value actually allocated to parcel A?

A. Well, in my method of reaching an opinion as to value, I considered that parcel A was a waterway or right-of-way, just as a street is, and that the area, the upland area, the land area, would reflect the value of the entire parcel.

Q. I understood also that you started your computation of the value to a large extent there by seeking to restore to the San Francisco Bridge Company the money which they had expended or the value which they had contributed to the land prior to November, 1942, that is, the building of the pier and the dredging of the mud in area A? [784]

A. I don't know how you reach that conclusion.

Q. Well, as I understood you, you fix a contribution of value to the property for building the pier of \$12,000.

A. That was my estimate of it.

(Testimony of Ewart Goodwin)

Q. Yes?

And for dredging, \$15,000?

A. That was my estimate of what the area dredged immediately in front of the parcel might have cost at that time.

Q. Now, what effect did you give to those parcels in arriving at your rental value per acre?

A. Well, as they were reflected in my opinion of the valuation of or marketability of parcel No. 7.

Q. In other words, parcel No. 7 with a pier on it would be worth \$12,000 more than parcel No. 7 without it?

A. Well, it would be worth more. Of course, in the final analysis the question was how much would some lessee, the San Francisco Bridge or some other lessee be justified in paying for the entire area of parcel 7.

Q. That is for the use of it, you would say, for a period of 17 or 18 years to follow?

A. Yes.

Q. And your opinion is that they would be justified in figuring in the contributed value of \$12,000 because of the pier being there? [785]

A. Well, I don't know what value specifically a person might take into consideration by reason of the pier being there. The fact that the pier, in my opinion, might have been built at a cost of \$12,000 doesn't necessarily mean that someone else coming along would want to use the same pier just the way it was. It might fit their needs or might have to be considerably altered. The channel might have to be a little deeper, or might be just right.

Q. But for anyone who contemplated a use similar to that that the San Francisco Bridge was making of it, that would save them an investment of \$12,000 to build a pier like that?

A. Yes, sir.

(Testimony of Ewart Goodwin)

Q. Now, with respect to the dredging, I believe you gave us a figure of \$15,000, which I assume you treated in the same manner. Where did you get that figure?

A. I computed what, in my opinion, was the maximum amount of earth or spoil that would have to be removed from the parcel, the parallelogram to which we have referred, to reach a depth of 10 to 11 or 12 feet.

Q. Would it make any difference if the excavations went outside of the boundaries of the San Francisco Bridge lease and carried on westward clear to the deep water?

A. Yes, that would be of additional advantage, yes, sir. [786]

Q. So that any money that was spent in dredging westerly of parcel 7 added to the value of the leasehold, did it?

A. Well, not necessarily any more. You could go down further than necessary or you might put a much wider channel there than was necessary.

Q. I am speaking of any dredging that was actually done prior to 1942, in November.

A. Yes, it would definitely add to the value.

Q. Do you know who did that dredging, actually?

A. Well, I know who paid it. I think, as I recall it, Case Construction did the dredging, but San Francisco Bridge paid for it.

Q. Don't you know that the San Francisco Bridge Company did the dredging itself, with its own equipment?

A. I don't believe they did.

Q. You do know that the Case Company was operating in that vicinity?

A. Yes.

(Testimony of Ewart Goodwin)

Q. Do you know that 163,000 cubic yards of spoil was taken out of the bottom and unloaded in the mole fills in the land to the south of parcel 3?

A. No, I don't know that exactly that quantity was taken out.

Q. Did you have a quantity when you were making your computations? [787]

A. Yes, I did. I had assumed that spoil was taken out of the area, but outside of getting additional spoil to raise the land, I didn't figure where they could get that much spoil or where they would need that much to accomplish the dredging down to the required depth. It wouldn't equal that many cubic yards of spoil.

Q. You are not a dredging engineer, are you?

A. No, sir.

Q. And you would be guided somewhat by the testimony of the man who actually did the dredging, wouldn't you?

A. Certainly, excepting for the point that possibly he might have gone a little bit beyond what was absolutely necessary in polishing it up.

Q. Well, if area A, having reference to the southerly portion, was dredged to a depth of 10 feet, I understood you to say that added to the value of parcel 7?

A. Yes.

Q. And if it were dredged to 12 feet, would that make any difference in whether it was valuable or not?

A. Yes, it would add slightly to the value.

Q. It would be more valuable if it were 12 feet?

A. Yes.

Q. So that if that was the precise amount of cubic yards that was taken out, that was a contribution to the value of that land? [788]

A. Yes.

(Testimony of Ewart Goodwin)

Q. Now, if you made a computation, would you be kind enough to give me the number of cubic yards you did compute in arriving at the \$15,000 cost?

A. I don't believe I have the notation on the computation here, as to the number of yards. The question that was asked when I said that the amount would equal \$15,000 was directed at that time to the parallelogram.

Q. To be perfectly fair with you, I will say that the testimony so far shows there was 163,000 cubic yards taken out by the San Francisco Bridge Company during the month of February, 1941, in area A,—

A. Yes.

Q. —adjacent to parcel 7?

A. Yes.

Q. You don't know whether that was the figure you used in your computations?

A. No, I did not feel—that is not the figure I used. I used a lesser figure.

Q. What rate did you use as the reasonable cost of removing a dredging of that sort at that time?

A. As I recall, the rate at that time was 15 cents a yard.

Q. Do you know what rate was actually paid the Case people for dredging immediately offshore parcel 1? [789]

A. Well, that wasn't dredged, as I recall, at that particular time. I don't believe that I know what Case was paid in that particular instance. I am familiar with what they and others were paid and as to what the going charge had been on a number of contracts that had been let as the channel was dredged coming down the Bay.

Q. Isn't it a fact that the contracts which were actually let in the northerly portion of parcel A at about this same time were, respectively 32 cents a cubic yard and 39 cents a cubic yard?

A. No, I didn't know that.

(Testimony of Ewart Goodwin)

Q. So if you should base your computation on the actual yardage removed and the actual going rate of removal at that time, it would make quite an increase in your figure of \$15,000, would it not?

A. Yes. I believe, to the best of my knowledge, I used the going rate at that time.

Q. Which was 15 cents, you say?

A. Yes. In fact, there were some that had been let for less than that.

Q. Those were for large areas under government contract and involved millions of yards, were they not?

A. Yes, but with a greater distance to the spoil areas than was involved here.

Q. There were many considerations that were different [790] from those immediately in this area?

A. Yes. Well, advantages and disadvantages.

Q. It worked both ways? A. That's right.

Q. I believe you said in your direct testimony that, in your opinion, the rental value of this property in 1942, referring to parcel 7, 6.26 acres, was 2 cents a square foot? A. Yes, sir.

Q. So if that was about four times the rental value of parcel 2, parcel 2 would have a rental value of one-half cent a square foot, if my mathematics is developing properly? A. Yes.

Q. And you attributed no individual value, no segregated value, to the right to use the water area, 8.28 acres, in parcel A? A. No, sir.

Q. I believe you compared that to a street frontage which gives value to the abutting property?

A. Or a right-of-way,—

(Testimony of Ewart Goodwin)

Q. Or a right-of-way?

A. —that is reserved to it, and as comparable with the same privilege that was granted in many of the San Diego Harbor leases that were available for comparison.

Q. Isn't it true that in those San Diego Harbor leases a charge of about one cent a square foot was made in addition [791] to the charge for the land area?

A. No.

Q. Don't you know that those leases provide a figure of so much per month for the water area?

A. There are in some instances wharfage charges made, where that is the case, but that square footage would apply to the wharfage primarily, not the entire—

Q. I didn't say it was a square footage charge, but is it not true that a charge was charged to the tenant on the land for the use of the water immediately in front of his territory?

A. In some cases. There were cases where it was sublet on no charge for the use of the land, or it was so nominal that in considering a comparable piece of property it couldn't be reflected in the property itself.

Q. Did you find the land rental rate in these areas which you have marked on Plaintiff's Exhibit No. 6 the rate in effect in 1942, in November, ran about two to three cents a square foot?

A. No, definitely not.

Q. Did you find them to be more or less?

A. Less.

Q. Can you name, or do you have a list of the rentals? Referring now to the area which you have marked with the letter U on the exhibit, am I right in identifying that as [792] the Campbell Machine Company? No, that must be No. "X." That "X" is the Campbell Machine Company lease.

A. "U" or "X"?

(Testimony of Ewart Goodwin)

Q. I think it is "X." I will have to ask you the question. A. "U" was National Machine Works.

Q. And "X" was Campbell Machine, as I remember it.

A. And that lease was a lease entered into on April 1, 1941. Do you want the rent paid?

Q. Yes. Give me the rate for the first five years.

A. One cent per square foot.

Q. And the second five years?

A. The next ten years was at one and one-half cents per square foot, and the last ten years would be at two cents a square foot.

Q. Now, how much rental did they pay for their water area fronting on that property, according to the lease?

A. In the case of the National Iron Works—

Q. I am speaking of the Campbell Machine Company, No. "X."

A. Let me see. The Campbell Machine Company had a \$25 per month additional amount for the portion that was water area.

Q. Do you know how many acres were in that water area? [793]

A. No, except that in their instance that the water area which, of course, included, as I recall it, some wharves also figured out at about three cents a square foot.

Q. Three cents a square foot? A. Yes, sir.

Q. Now, going down to the Sun Harbor, which I believe you have identified with the letter P, can you tell me on what basis they were paying for the water which fronted on their shoreland?

A. Well, they didn't pay anything for the water. They paid \$25 a month for the wharf that was there.

(Testimony of Ewart Goodwin)

Q. Well, the right to use the water for a wharf?

A. Yes, but they also have the right to come and go and a permissive use of the area fronting it that is considerably more than the wharf itself.

Q. That right is common to the adjacent owners, is it not, that the people on each side could go and come through that same water?

A. No, not necessarily. The Harbor Department was interested in giving a more or less exclusive use to those areas, so they would not have to police it themselves, that they would let the fellow to whom they loaned it tell the other fellows to keep moving.

Q. Can you tell me of any lease issued by the City of San Diego which has a clause which assures the lessee of [794] exclusive use of the entire water area?

A. Yes, I believe to all intents and purposes the Campbell Machine lease has what amounts to an exclusive use. That is, that doesn't mean they can deny, when absolutely necessary, other people maneuvering over their property to get into a dock that they desire to tie up to, but they couldn't just park out there on the area that the Campbell Machine Company has as their area.

Q. Do you know of anything in the lease to prevent anyone from parking in front of them?

A. As I recall, on that lease they did definitely,—the Campbell Machine did definitely have the authority to tell them to move on.

Q. You don't happen to have a copy of the lease, do you?

A. No, I am sorry, I don't, sir.

Q. Now, I believe you have referred to this land and water of the San Francisco Bridge Company as being of high value compared to shorelands.

A. Yes, it is a very nice parcel.

(Testimony of Ewart Goodwin)

Q. That is due to the fact that it had protection both north and south by these mole piers, and due to the fact it had a long shoreline? A. Yes.

Q. Now, let's turn to the provisions of the lease [795] itself. I take it, you might have a valuable piece of land which would have a lease drawn over it so restricted as to kill many of the favorable features which existed in the land itself; is that right? A. Yes, sir.

Q. On the other hand, you might have a lease which would accentuate those favorable features; is that right?

A. Yes, sir. [796]

Q. I don't know whether you have had an opportunity to examine this San Francisco Bridge Company lease or not. But do you have a copy before you?

A. Yes; I have examined it previously and have a copy of this lease.

Q. In the first place, let me see if we understand each other about the value of leases. As I interpret your testimony, when you look at it from the owner's standpoint, the lease is worth the rate he is going to get out of it?

A. Yes, sir.

Q. Which may be too much or too little?

A. Yes, sir.

Q. In other words, if my uncle had owned Parcel 7 and wanted to give me a lease at a dollar a month, that wouldn't be a very good commercial bargain, but, if he had signed up for 20 years, that would be all he would get out of it?

A. Yes; it would be a very good commercial bargain for you.

Q. Yes. Now, if the City of National City made an arrangement regarding some mud flats which it owned, as

(Testimony of Ewart Goodwin)

a result of which it would turn out, after the expiration of a 20-year lease, there were some dry land and some good deep water, that was purely a matter between the project and the City of National City to arrange the terms, was it not? A. Yes, sir. [797]

Q. I call your attention to the first paragraph in the lease, after the "Witnesseth," and in which it is recited that the San Francisco Bridge Company "has this day entered into an agreement with the company for filling and improvement of certain portions thereof, in consideration for which work of improvement and upon the additional considerations herein contained, the City of National City does, by these presents" make the lease, so that this element I have referred to, of improving the land on terms that were satisfactory to the owner and to the lessee, would be covered by that paragraph, is that right?

A. Yes, sir.

Q. Then we have the descriptions of Parcels 1 and 2, which were the subdivisions made in the lease, which are not the same as the Parcels 1 and 2 that are here in evidence? You understand that, do you not? In other words, Parcels 1 and 2 together made up Parcel 7, which comprises 6.26 acres? A. Yes, sir.

Q. This Parcel A is really what is in this lease termed Parcel 3, is it not, the 8.28 water area? Is that your understanding? A. Yes, sir.

Q. And, to go back to your direct testimony, on the land appraisals you attribute a rental of 2 cents a square foot and on the water area, taken alone, in itself, no value? [798] A. That is correct.

(Testimony of Ewart Goodwin)

Q. This 2 cents a square foot, I take it, is the value to the San Francisco Bridge Company rather than the value to National City?

A. Yes, sir; as of the date of taking.

Q. Yes; that is what the testimony relates to. So that, in speaking of the San Francisco Bridge Company, that is typical, and by that we mean in present testimony to obtain land in that vicinity, by someone familiar with its highest uses and familiar with the whole situation?

That would have a value to that which they could afford to pay and you fix that at 2 cents? A. Yes, sir.

Q. It is true, is it not, that, when someone rents a piece of land and agrees to pay 2 cents a foot or 2 cents an acre, they do that with the expectation of being able to use the land to advantage, at a profit, paying the rent that is agreed? A. Yes.

Q. Being what you have testified is the fair rental value? A. Yes, sir.

Q. And, if they have the authority and the opportunity to make a resale or sublease that they may contemplate making a profit to them, I believe that is what you call bonus value, [799] is it not? A. Yes.

Q. Now, comparing this lease with other leases, let me call your attention, on page 2, to paragraph First.

Would you say that a lease is more or less favorable to the lessee, that is, the San Francisco Bridge Company, for example, where it is divided into an original term of 10 years, with an option to take another 10 years? As I understand, that means that at the end of 10 years, if the

(Testimony of Ewart Goodwin)

situation looks good, they can go on with their lease for another 10 years.

A. Generally speaking, that is favorable. An option is not always firm but it does give the lessee an escape if things don't look good, or a chance to renegotiate.

Q. Whereas, if they had an absolute lease for 20 years, they would have to go on paying rent whether they had made a bad bargain or not?

A. They can't talk the landlord into helping them out then.

Q. We have discussed the second part of that paragraph First, which shows that there was only a nominal rental left to be paid after the San Francisco Company had built the pier and done the dredging and filled the other lands which belonged to National City, and I believe you computed that to show how much they would get at \$10 a month, during the [800] balance of the first 10 years, and how much they would get at \$50 a month for the second 10-year term? A. Yes, sir.

Q. Do I understand that you capitalized that total rent payment? What use did you make of that figure?

A. The rent payment?

Q. Yes.

A. I capitalized the value of the rental payments for a period on the basis of 3 per cent for the first eight years and then the value of the first \$100 per year, deferred eight years, figuring the present value of that or the discounted value, bringing it all to a head about this time; also at 3 per cent.

Q. Does that have anything to do with the value of the lease as of November 10, 1942?

A. Only indirectly in that the—or directly and indirectly in that the difference between that and the differ-

(Testimony of Ewart Goodwin)

ence in the value of the land when National City gets it back, say 18 years from now, or 18 years from 1942,—the remaining value would go to the lessee.

Q. In other words, we are getting into the other branch of the case now, where you are figuring the value of the fee. That does have a bearing on that?

A. Yes, because, naturally, the value to the lessee would not exceed the actual value of the fee. That is all [801] there is in my value and the lessees must essentially come out of that.

Q. Or, to put it the other way around, if the value of the lease amounts to so many dollars, there must be some value to the owner after the lease has expired?

A. That is right.

Q. It hasn't disappeared into thin air, has it?

A. No, but it is considerably dissipated when it is put off into the future.

Q. You don't know whether it will be there or not?

A. Or how much.

Q. Now, actually there was about a little less than \$7,000 still for the San Francisco Bridge Company to pay under this lease, was there not? A. Yes.

Q. So they had virtually prepaid their 18-year lease except for the token rental, whereas, if they had walked in and laid down \$7,000 and said, "We are paying up in full," then they would have the right of occupancy for the next 18 years, without the payment of anything?

A. That is correct.

Q. Going on to paragraph Second now, are you aware that the leases issued by the City of San Diego confined the lessee very strictly to the kind of business that he could carry on, specifying in each lease, for example, that

(Testimony of Ewart Goodwin)

[802] the property was to be used for a shipyard or for a cannery or for an oil station? A. Yes.

Q. Do you know of any lease issued by the City of San Diego which contains the language found in paragraph Second here, that the lessee may use the property in the conduct and operation of any lawful business except only that it shall not constitute a nuisance or infringe on zoning restrictions? Is that more or less favorable than the other leases you call to mind?

A. I would say on the face of it it was more favorable.

Q. Now, take the last sentence in that paragraph Second, "The City of National City agrees to enact and to enforce during the term of this lease such ordinances and regulations as lie within its jurisdiction designed to maintain for the company the exclusive use of the water within said Parcel 3." Are you aware of any such provisions in any lease issued by the City of San Diego?

A. Not directly in that same language; I am not; no, sir.

Q. Referring to paragraph Third, I believe we do find provisions in San Diego leases, do we not, that the improvements may be removed at the end of the term?

A. Yes, sir. [803]

Q. That is a provision favorable to the lessee wherever we find it, is it not? A. Yes, sir.

(Testimony of Ewart Goodwin)

Q. The provisions of paragraph Fourth, that "The City agree to open and maintain a public street or road across the intervening tidelands connecting with or improved street or streets of said city," that, I take it, would refer to the right to cross from Parcel 7, going over Parcel 2 or Parcel 3, and so on across city lands until they come to an open street? A. Yes, sir.

Q. And the right to maintain water, gas, telephone and electric lines in or adjacent to such road or street—would you say those are favorable conditions for the lessee to have in his lease? A. Yes; they are essential.

Q. Then, paragraph Fifth, that the City agrees to furnish police and fire protection. Is that favorable?

A. Yes.

Q. Referring, now, to paragraph Seventh, which has to do with assignment or subletting, do you know of any provision in the leases of the City of San Diego where the City specifies that it will permit an assignment of the entire lease, the only limitation being that the new assignee shall be a person whose financial standing and responsibility shall be generally accepted in the community? [804]

A. No. I may be off in my recollection but I think that that would have to be read in connection with Paragraph Ten—

Q. All right; let's go to paragraph Ten, in which "it is understood and agreed that the City reserves to its

(Testimony of Ewart Goodwin)

Board of Trustees the rights and privileges to annul, change or modify this lease upon the violation of any of the provisions hereof by the lessee, as in its judgment may seem proper." And then, further, "Reference is hereby made to all existing laws relating to the leasing of tidelands by the City of National City and by such reference all restrictions or conditions imposed and all reservations granted are hereby made a part of this lease with the same effect as though expressly set forth herein."

A. I would have to read that in connection with the clause in the act on leasing to be sure just how that worked. I don't think it is a matter of great importance. They make it subject to something which I don't think they can do in the act.

Q. If you have read the act, don't you think you will find that the language of the act is identical with the language of the provision there, "that the City reserves to its Board of Trustees the right and privilege to annul, change or modify this lease upon the violation of any of the provisions hereof by the lessee"?

A. I am not sure that it ties it in. I am not sure it [805] is material, but, if the act is here, I think we could find out.

Q. It is unfair to ask you to tell us what the acts are. Do you know of any lease of the City of San Diego which does not reserve absolutely to the City the right to cancel or annul the lease at any time, for any reason?

A. No.

(Testimony of Ewart Goodwin)

Q. So these would be, in your opinion, very much more valuable to the lessee?

A. Well, I couldn't say it unqualifiedly. The question in my mind is whether, without saying it, we are put somewhat in the same position as far as the assignment is concerned as the City is by specifically mentioning it in their leases.

Q. But assuming that this language in the lease does not run counter to any language in the statute, you would say this is a more valuable provision for the lessee than the provisions which are contained in the City of San Diego leases? A. Yes, sir.

Q. Because of all of those favorable provisions, and in view of this very valuable location, the key of this area here, do you think that 2 cents a square foot is a sufficient value to place on Parcel 7, without giving any value at all to the 8.20 acres in which it has exclusive acreage? [806] A. Yes, sir; I do.

Q. You stand on your original opinion on that?

A. Yes, sir.

Mr. Sloane: That is all.

Mr. Landrum: Is there anyone else?

The Court: That completes the examination by the defendants.

Mr. Crouch: No questions by the Tavares Construction Company.

Mr. Landrum: Mr. Cotton, please.

O. W. COTTON,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: O. W. Cotton.

Direct Examination

By Mr. Landrum:

Q. Where do you live, Mr. Cotton?

A. In San Diego.

Q. How long have you lived in San Diego?

A. 43 years.

Q. How old a man are you? A. 65.

Q. What is your business or profession?

A. Realtor and appraiser and property manager. [807]

Q. How long have you been in that business here in the City of San Diego?

A. Every since I have been here.

Q. You have seen the city grow through the years?

A. Yes.

Q. Mr. Cotton, will you tell the court and jury briefly something of your experience in connection with the buying, selling and handling and appraisal of real estate?

A. When I first came here, I went into the subdivision business with two partners. I was in that business for some time. I finally joined the firm; in fact I went into the firm and, as partners, we operated a subdivision of land in San Diego and sold a good many thousands of lots. And then we incorporated and I was secretary and treasurer of the company and manager there in that capacity about four years. After that I organized the Pa-

(Testimony of O. W. Cotton)

cific Building Company and we went into the business in the new company, of which I was president and general manager, of buying a tract of land and building homes and constructing other buildings in San Diego. I think that company was in existence for 20 years. During all of its life I acted as appraiser for all properties that the company bought and sold and on all of the loans that we made. After that I purchased the business of the Pacific Building Company and conducted its affairs under my own name until about two years ago, when I formed a partnership with my [808] two sons, and we now operate the business as O. W. Cotton Company. During these years my business has been to sell and deal in all types of real estate and build various types of buildings and manage properties and to appraise properties of various characters.

Q. Mr. Cotton, during the years that you have been here in the City of San Diego, have you held any positions or offices in connection with realty boards or anything of that kind?

A. Yes. In 1915 I was president of the San Diego Realty Board, and also in 1939. I was a director of the Realty Board for a number of years, in 1915, 1916 and 1917, and 1937, 1938 and 1939. I then went on the board of directors of the State Association. I was vice president of the Brokers Institute of the National Association of Real Estate Boards. I have held various positions in the appraisal division of our local Realty Board and I have been on the appraisal board of the State Real Estate Association and also the property management division.

(Testimony of O. W. Cotton)

Q. Now, have you engaged in any writings for purposes with relation to your work?

A. Yes; I have done more or less writing. I wrote the history of real estate for the last History of San Diego, the history of San Diego real estate for the last History of San Diego, published in 1936. I wrote the Rise and Fall of Real [809] Estate in San Diego for 50 years, dated in 1919. I wrote a book on How to Deal in Real Estate, and a good many articles for the National and other real estate journals and for our local newspapers, Sunday editions, feature articles on real estate.

Q. Will you just sketch briefly for us a few appraisals that you have made of particular properties, just a few of them, with relation particularly to lands somewhat similar in character to the lands with which we are here concerned, Mr. Cotton?

A. In 1921, I appraised for the Chamber of Commerce, a thousand acres, more or less, of land, industrial land, which they afterwards purchased to hold for development for industrial purposes. That extended from somewhere south of the south line of San Diego down into Chula Vista, along the water front and along the railroad. I appraised industrial lands for the Consolidated Aircraft Company, now the Consolidated Vultee, for the City of San Diego, and I appraised all of the lands, including the industrial lands, for the Spreckels Company, who owned all types of real estate in San Diego.

Q. Mr. Cotton, for how long a period of time would you say that you have been generally familiar with the

(Testimony of O. W. Cotton)

lands with which we are here involved, known as the Johnson property, for instance? [810]

A. As I understand it, Parcel 9 and the lands here which we have been calling the lands of the City of National City?

Q. Yes. How long have you known that land?

A. More or less, since I have been here, but particularly I was interested in that district when I made a large appraisal of several hundred parcels of land extending from the very north of the Destroyer Base down to National City, including a lot of National City property along this district and from there north, the property that was finally taken over and is now used as part of the Destroyer Base, about 300 parcels. I at that time became most familiar with the district.

Q. Now, I am going to ask you whether or not, in the year 1942, you were asked to make a specific appraisal of the land with which we are here concerned.

A. Yes.

Q. And did you make such an appraisal?

A. I did.

Q. Who did you make it for?

A. I will have to refer to my notes, I think. My specific instructions came from R. S. Seabrook of the Tavares Construction Company.

Q. To just get it correct, you made that appraisal at the request of the Tavares Construction Company in connection [811] with the Defense Plant Corporation, did you not?

A. Pardon me; I have two authorizations. One was Mr. Carlos Tavares and the other was from Mr. Sea-

(Testimony of O. W. Cotton)

brook of the Tavares Construction Company, both of them.

Q. And when did you start the making of that appraisal?

A. That was on September 9th that I first went down to the plant.

Q. September 9, 1942? A. Yes, sir.

Q. Just briefly, give us a little mind picture of what that land was when you went down there to appraise it in 1942, its physical characteristics as you remember it.

A. It was filled with land, filled from the spoil of the Bay. It was in very good condition as tidelands, fairly level, and the mixture of soil and silt from the Bay about the same as our tidelands in San Diego City.

Q. Did you proceed then to make an appraisal after that? A. Yes.

Q. And what were you to do? What were you endeavoring to find out in connection with that appraisal?

A. Well, the instructions were to ascertain the market value, the fair market value, of the land without the buildings or improvements.

Q. Do you mean without the improvements that the government had made on it? [812]

A. Without any buildings or improvements except in the one instance, which was the Bridge Company improvements.

Q. What do you understand to be the meaning of the term "fair market value" in a condemnation case?

A. The fair market value is the value or the highest price, in terms of money, that the land or property will sell for, if exposed for sale on the open market, given a

(Testimony of O. W. Cotton)

reasonable time to find a purchaser knowing all of the purposes and uses to which the property is capable of being used, and presuming that your purchaser is willing to but not compelled to buy and the seller is willing to but not compelled to sell.

Q. Now, just tell us what you did in making this appraisal, the procedure that you went through.

A. Well, I went down first and met Mr. Carlos Tavares and Mr. R. S. Seabrook, and the managing partner, I believe, of Concrete Ship Constructors, and I met Mr. N. J. Allender, who was the resident plant engineer of the U. S. Maritime Commission. I also met Mr. G. W. Eisenman, the project engineer, and from Mr. Eisenman I secured maps of the property to be appraised. And, in company with a guide, I went over and inspected the properties. I was given a badge so that I might come down again from time to time and inspect the property at my leisure, and during my investigation I did return to the property a number of times to look over the land and to note particularly its relation to the bulkhead line and [813] the pierhead line and the elevation, topography and accessibility to transportation facilities and so forth. In order to give an opinion as to the value of the land, I took all of these things into consideration and also the location of the land in its relation to National City and San Diego. I gave consideration to the character of the homes in the vicinity and the character of the homes within a radius of a number of miles to determine the accessibility of the property from the standpoint of the workmen. And I gave consideration to the time required for workmen to get back and forth to their homes.

(Testimony of O. W. Cotton)

Q. In connection with your investigation, did you have a talk with and did you call upon the Mayor of the City of National City?

A. Yes, sir; I discussed the matter of the taking of the leases and the listing of the properties with the Mayor, who was then Mr. Thatcher, and with the City Engineer of National City, who was Mr. Ireland, and asked for their opinion of the value of the land and the general conditions.

Q. Did you also have a discussion with Mr. Brennan here in San Diego?

A. Yes; I discussed the matter of leases generally on the tidelands and the tidelands leasing of San Diego with Mr. Brennan, to ascertain what his opinion was here and what they were doing in San Diego. [814]

Q. Mr. Cotton, in the appraisal of real estate, you gentlemen who follow that have what you call methods of approach, do you not? A. Yes.

Q. What are the methods of approach which an appraiser uses in approaching the problem which confronted you on September 9, 1942?

A. There are, generally speaking, three methods of approach. There is the comparative method by which you compare the subject property you are appraising with other properties of similar character. There is the capitalization value, capitalizing the income and taking the total amount of capital that would be required to be used to purchase a property based on the income. And there is the value of the land and the improvements on the land. Those are the three methods that are generally used.

(Testimony of O. W. Cotton)

Q. In the problem such as confronted you on September 9, 1942, which one or two or which one of those methods did you start out with?

A. Well, I used, very largely, the comparative value.

Q. Do you mean that you attempted to find sales of property that you considered comparable to this and used that as a basis? A. Yes.

Q. Did you attempt to approach the problem from the [815] economic standpoint at all?

A. That was not very practical and I didn't use that method. I took into consideration the leases that were on the properties, but we were in a state of war and the condition was very uncertain, and the background for leases in that district was so bad that it didn't seem practical to try to form an opinion based on the rental value.

Q. And why do you say you didn't think that was the most feasible way to approach it?

A. Because the conditions were not satisfactory. For example, there was a piece of land just north of National City, that had been leased some 25 or more years before by a man to develop an industry down there, of 40 acres, and during that whole period—I have forgotten whether it was 25 or 40 years; 25 years, I am sure—all he was able to lease was one piece of land of about five acres, and he had to carry the rest of it all that time. There was practically, until the war broke out, nothing of consequence leased in the City of National City.

Q. Were you successful in finding some recent sales in that locality of property which you considered comparable to this, for the purpose of evaluating this?

A. Oh, yes.

(Testimony of O. W. Cotton)

Q. Will you just name some of those sales for us, giving us the names of the sellers, the names of the buyers, the date of the sale and a description of the land?

Mr. Monroe: We will object to that as incompetent, your Honor.

The Court: The objection is overruled. It is about time for our afternoon recess, ladies and gentlemen. Remember the admonition during the recess and please occupy the jury room.

(Short recess.)

The Court: All present. Proceed. The last question, I believe, was unanswered.

Q. By Mr. Landrum: I believe, at the time the court recessed, Mr. Cotton, I asked you to give us a list of those sales which you took into consideration, giving us the names of the sellers and the names of the buyers and the date of the sales and a description of the property.

A. Among the sales were a property sold by John G. Ingall to the City of San Diego, John G. Ingall and Eva A. Fly to the City of San Diego. It was Block 68, S. A. Abels Addition, eight lots, except for a small strip sliced off of the front of Lots 1 to 6 inclusive.

Q. And the date of the sale, please, sir?

A. The date of the sale was October 4, 1940. The block was nearly 300 by 600 feet.

Then, a property of the Santa Fe Land & Improvement Company to the Rohr Aircraft Corporation, a portion of the north [817] 680 feet of quarter section 171 of Chula Vista, California, 10 acres, more or less, sold October 15, 1940. Another parcel by the same grantor, the Santa Fe Land & Improvement Company, to the Rohr Aircraft Corporation, the south 550 feet of the north half

(Testimony of O. W. Cotton)

of quarter section 171, Chula Vista, California, approximately 10 acres, sold on January 22, 1941. Another parcel by the Santa Fe Land & Improvement Company to the Rohr Aircraft Corporation, the south half of quarter section No. 171, Chula Vista, approximately 15 acres, sold June 11, 1941. A sale by the Tycrete Chemical Corporation to the Rohr Aircraft Corporation, a portion of the north 170 feet of quarter section 171, Chula Vista, approximately three acres. A sale by J. E. Armstrong to the Rohr Aircraft Corporation, the southwest quarter of the southwest quarter of Section 136, Chula Vista, being 8 acres more or less. A sale from the California Cotton Oil Company to Joseph Schadet—pardon me; that last sale was on August 14, 1942. The sale from the California Cotton Oil Company to Schadet was a portion of quarter section 173, Chula Vista, California, being 73 acres, sold August 11, 1941—pardon me; July 11, 1941. The San Diego, Arizona & Eastern Railroad Company, grantor, to Harry P. Boyd and Mary E. Boyd, the northwest quarter of the southwest quarter of Section 161, Chula Vista, California, being 6.27 acres. That sale was made in October, 1942. [818]

Q. Mr. Cotton, do you have a large number of these sales?

A. I have just a few more sales and listings I made in all of them.

Q. Suppose we leave it there. You do have a number of others and some listings, do you not? A. Yes.

Q. Now, Mr. Cotton, in connection with your investigation of this property and your studies of it, have you

(Testimony of O. W. Cotton)

valued them all from the 9th day of September on through until November 10th, and then since that time?

A. Well, from time to time, naturally, knowing that we would be called upon.

Q. Mr. Cotton, what, in your opinion, was the use or uses to which this property was suitable and adaptable on November 10, 1942?

A. For industrial property.

Q. From your experience which you have given us in connection with the buying, selling and handling of real estate and your own personal knowledge of the property in this action known as the Johnson property, do you have an opinion with relation to the fair market value of that property as of November 10, 1942? A. Yes.

Q. And what, Mr. Cotton, is your opinion of the fair [819] market value of the Johnson property?

A. That is Parcel No. 9, I believe, is it not?

Q. Yes, sir. A. \$3225.

Q. \$3225? A. Yes, sir.

Q. Mr. Cotton, from your experience which you have given us with relation to the buying, selling and handling and appraisal of real estate, and from your personal studies and inspection, do you have an opinion of the market value of the lands with which we are here concerned known as the City of National City lands and all of the interests therein, as of November 10, 1942, giving to it all uses to which, in your opinion, it was suitable or adaptable, leaving out any increased value due to the improvements made at the expense of the government?

A. Yes.

(Testimony of O. W. Cotton)

Q. Now, taking the whole City of National City fee, what, in your opinion, is the fair market value of that in dollars and cents?

A. That is to include Parcel A?

Q. Yes; and also including, of course, this leasehold interest of the San Francisco Bridge Company.

A. \$248,000.

Q. \$248,000? [820] A. Yes, sir.

Q. Now, I believe that, within that, we have the leasehold interest of the City of National City, have we not, or I mean of the San Francisco Bridge Company?

A. Yes.

Q. Do you have an opinion with relation to the fair market value of the leasehold interest of the San Francisco Bridge Company, which should be taken out of your total here, that is, separating the San Francisco Bridge Company?

A. I arrived at that by computing the cost of the dredging and the improvements put in by the San Francisco Bridge Company.

Q. You do have an opinion of the value of the leasehold? A. Yes.

Q. That is included in your overall figure of \$248,000? A. Yes, sir.

Q. What is your breakdown on it? What, in your opinion, was the leasehold interest of the San Francisco Bridge Company worth? A. \$181,800.

Mr. Landrum: You may cross examine, gentlemen.

(Testimony of O. W. Cotton)

Cross Examination

By Mr. Monroe:

Q. Mr. Cotton, in connection with your experience as an appraiser, you have made appraisements in a great many of [821] the cases where the United States government has condemned lands in San Diego County, have you not? A. A number of them; yes, sir.

Q. Can you remember about how many?

A. No; I don't remember.

Q. You have testified in a number of those cases, have you not? A. Yes.

Q. In about how many cases?

A. Well, I would guess maybe a dozen or so.

Q. And in how many of those cases did you testify on behalf of owners of property?

A. I don't think any.

Q. What would you say with reference to the values of property in 1942? I am speaking now of the general trend of values in San Diego County? Was that up or down? A. What time in 1942?

Q. Well, October or November, 1942.

A. The trend was up at that time.

Q. And would you say that, in 1942, in November, prices of property generally in and about San Diego were as high as they ever had been? A. No.

Q. You think they have been some higher?

A. Much higher. [822]

Q. And when would you think they were much higher? A. About 1927.

(Testimony of O. W. Cotton)

Q. When would you say that the prices started up? You say they were on the up in 1942. About when would you say they started up?

A. About—oh, the fall of 1934.

Q. And they have been going up ever since then?

A. No. They had some recessions. When the war broke out, generally, things stopped for a while, and, when we got into the war with Japan, immediately after Pearl Harbor, things were definitely at a standstill for a while. And that was why I asked you the question as to what part of 1942 you had in mind because, early in 1942, people were on the fence, wondering what was going to happen.

Q. We were all a little bit scared then, were we not?

A. A little bit; yes, sir.

Q. As I understand you, you felt that the approach from the angle of capitalizing the rent wasn't of much help to you, is that right? A. Yes.

Q. So your opinion is not based upon any rental value one way or the other?

A. Practically entirely on the comparative sales value.

Q. On any of these sales were there concerned any property that extended from the mean high tide line out to the [823] pierhead line? A. No.

Q. Of course, we all know there are not any such sales, is that right? A. That is right.

Q. And there isn't any property of that description in San Diego Bay that has been sold at all?

A. That is correct.

(Testimony of O. W. Cotton)

Q. You did, however, as I take it, undertake to determine what it would sell for if it was salable, is that right?

A. We made this appraisal on the basis of the supposition, as we have to do very often in real estate, when you get up against a matter of that kind, of what it would sell for if it were fee-owned land. So that I appraised this in the same manner as I would if the land were fee-owned and could be conveyed.

Q. At the time you made your inspection of the land, you say it was in September, 1942?

A. The first stuff; yes.

Q. And you recognize Exhibit J, this big, long photograph down here at the end of the table, as about the way it looked at that time?

A. I haven't seen that. I will look at it.

Q. I hesitate to hand it to you because it is so big.

A. (Examining same.) That looks different from the [824] air than what it does when you are down looking up, but it looks to me like it is all right.

Q. That would be the way the layout looked at that time?

A. As nearly as I could tell from a different viewpoint.

Q. You, however, in arriving at this valuation, if I understand you correctly, disregarded what was on the face of the land entirely?

A. Any improvements; yes.

Q. And just took the land—

A. That is right.

Q. —as though the improvements were not on there?

A. Yes.

(Testimony of O. W. Cotton)

Q. What did you consider, if anything, with reference to any dredging that was made in that area?

A. I took that into consideration.

Q. Did you give that a valuation or not?

A. The dredging would be of a value to some and to some it would not. Yes; I gave the property an added value because of the dredging that was there.

Q. When you made your appraisal in September, 1942, did you appraise Area A? A. No.

Q. The \$248,000, the figure which you now give us, in-[825] cludes Area A?

A. That was an appraisal I made a short time after that, on November 10th, I think it was, or as of November 10th.

Q. What I am getting at is the figure which you give us of \$248,000 includes Area A?

A. Yes; that is right. [826]

Q. How much valuation do you give for area A?

A. Area A, \$31,000.

Q. You give \$31,000 for area A?

A. Yes, sir.

Q. Now, the appraisal that you have given us here, is that the appraisal which you made in 1942?

A. Yes, as of November 10, 1942. That—let me explain that—this appraisal is an appraisal based on my appraisal at that time, and reviewed at the present time, but it is my opinion from that time until this time as to the value of this property as of November 10, 1942.

Q. Well, what I am trying to figure out, Mr. Cotton, is that the figure you give us today is very considerably more than the figure you get in that appraisal, is it not?

A. Yes.

(Testimony of O. W. Cotton)

Q. I want to find out what it is that makes for the difference in the appraisal, whether that was just a re-
vival of your figures or whether you included in the ap-
praisal you now give us something that you did not in-
clude in that appraisal?

A. Well, there are several things. In the first place,
my appraisal of that date was made as of October 27,
1942. Now, you would think there is no difference be-
tween November 4th—I mean between October 27th and
November 10th but on October 27th the government took
another 100 acres of [827] tidelands just north of this
property, which there had been talk about taking up until
that time, but until that time, and I had signed my ap-
praisal on the the same date it was taken, I was not in-
formed it had been taken. So in checking over my fig-
ures, when it developed that property was taken at that
time, and my further appraisal was of date, November
10th, that necessarily changed my appraisal because the
amount of available property is of material consequence
in the value of land.

Q. You mean you increased the value of the land be-
cause the government had taken something next door to
it?

A. Yes. When I made my appraisal there was 100
acres more land available for use than there was on No-
vember 10th.

Q. So that you have increased your valuations, as you
gave them at that time, by how much all together?

A. Well, let me see.

(Testimony of O. W. Cotton)

Q. About \$100,000.

A. No, I think it was something around \$50,000. If you want the exact figures, I will have to check them up; somewhere around that neighborhood.

Q. Well, \$31,000 of that includes, you say, parcel A?

A. Yes. Well, parcel A was increased from the October 27th figure of \$15,500 to the November 10th value of \$31,000.

Q. Now, in making your appraisal at that time did you disregard all excavations on the land? [828]

A. Yes.

Q. You did, however, take into consideration the improvements made by the San Francisco Bridge Company?

A. Yes.

Q. Your appraisal of parcel A was also made as of November 10, 1942? A. Yes.

Q. If you appraised that as of October 3, 1944, would there be any substantial difference in your figures?

A. October 3, 1944?

Q. Yes. Two years later? A. Yes.

Q. There was a very material change in values between 1942 and 1944, was there not?

A. There was, yes.

Q. Now, in appraising this property for the San Francisco Bridge Company you gave \$8,500 as the value of the pier? A. Yes.

Q. And you gave \$10,300 as the value of dredging?

A. Yes.

Q. And less damages, none? A. Correct.

(Testimony of O. W. Cotton)

Q. You mean by that, if I understand you correctly, [829] Mr. Cotton, that, in your opinion, there was no damage by reason of the favorable terms of the lease?

A. If we wanted to sell that lease to anybody who wanted to buy it, basing my calculations on the previous record of San Diego and the conditions at that time, it was my opinion that it would not be likely that we could find a customer for that lease that would pay a profit for it.

Q. Now, taking the situation as it existed in 1942, you assume for the purpose of evaluation that this property was held in fee and would be sold to a theoretical purchaser in fee; that is correct, is it not? A. Yes.

Q. So that he would have a total area of 96 and a fraction acres, a part of which was water which fronted on the Bay and extended to the pierhead line?

A. Yes.

Q. And you considered for that purpose also that it was not only available to the deep ship channel, but also that it had two railroad connections to back in?

A. Correct.

Q. And you considered all possible uses for it?

A. I did.

Q. Did you consider that it had a peculiar and unusual advantage for a shipyard?

A. Well, naturally there would be a logical location [830] for a shipyard or anything where you wanted to get to the water.

(Testimony of O. W. Cotton)

Q. Well, in that connection did you take into consideration that in addition to the railroad facilities and the water front we have spoken of, that the soil conditions entered into the condition for the purpose of a shipyard?

A. Well, I considered it for—as its greatest value for any kind of a heavy industrial business that required shipping by rail and water transportation.

Q. Well, at least, if I understand you correctly, you considered, among other things, that it had a utility as a shipyard or for shipyard purposes, regardless of whether it was peculiarly advantageous or not?

A. Yes.

Q. Now, in making that assumption, Mr. Cotton, did you bear in mind also the fact that there was no tideland property for sale around San Diego Bay?

A. I know there is none for sale. There can't be any bought.

Q. And that in 1942 San Diego had leased practically all of their tidelands?

A. The City of San Diego has, yes.

Q. Yes.

A. But there was vast acreage to the south that had not been leased yet. [831]

Q. But on the deep channel? A. No.

Q. So that bearing in mind that as you go around the Bay all the tidelands had been leased up to the destroyer base, and you have just stated the portion between the destroyer base and this property had already been taken,—

A. Correct.

(Testimony of O. W. Cotton)

Q. So, for a fellow that wanted 96 acres for a purpose, this was the last piece, was it not?

A. It was the last piece until you go further south, of course.

Q. Well, the last piece on the 30-foot channel?

A. Yes.

Q. Now, you also will bear in mind in that connection that property on the tidelands, tideland property, not only is not for sale in San Diego Bay, but it is not for sale adjacent to any city in California; that is right, isn't it?

A. Most of that is largely true. I believe there are one or two exceptions, but for the most part that is correct.

Q. That is generally a correct statement?

A. Yes.

Q. So that for practical purposes, on November 10, 1942, if you were in the position of being a broker who had this property for sale, you would have the only tract of its kind available for sale in California, wouldn't you? [832]

A. That is true, but I doubt if that could be used to influence the appraisal of the property, because it wouldn't work out just that way.

Q. Well, let's just suppose, for the sake of argument, that that was the fact. I am just trying to get relative values. Let's suppose that that was true, that you, as a broker, had this piece of property, and let us suppose I owned it and I came to you and laid it before you as a broker to sell for me. I have it in fee. It is the only piece of property of its kind. It is the only 96 acres that you could get in San Diego Bay on the deep channel.

(Testimony of O. W. Cotton)

Mr. Landrum: If the court please, I don't like to interrupt and I realize this is cross examination, but I believe it is certainly argumentative.

Mr. Monroe: This is cross examination.

The Court: I don't know what the question is. It has not been finished yet, Mr. Monroe, has it?

Mr. Monroe: No, I haven't got to it yet.

The Court: How is that?

Mr. Monroe: I haven't finished it.

The Court: You may finish it.

Mr. Monroe: I have completely lost track of where I dropped the question. I will just start over, if that is permissible.

The Court: Yes. [833]

Q. By Mr. Monroe: Let's suppose, Mr. Cotton, I came to you as the owner of that piece of land, and bearing in mind the things we have just gone over and that it is the only piece of that kind in California, I asked you what you could get for it for me on the open market. What would you think? A. What would I think?

Q. Yes, what would you tell me?

A. I would think you were a prevaricator.

Q. You wouldn't believe me to start with?

A. No.

Q. If that were the fact, Mr. Cotton, and I had for sale that piece of land under all of those circumstances, you would almost name any price you wanted to and get it, would you not?

A. No, I wouldn't say that. You would have to find the man who wanted it and who would be satisfied to take that location and all of the considerations that go with it. I wouldn't go so far as saying that. You cer-

(Testimony of O. W. Cotton)

tainly would have a monopoly, but whether you could get somebody, say, to come down from Seattle and put in a \$20,000,000 shipyard, or anything like that, is a question.

Q. It is always true, isn't it, that when you have a piece of property that is suitable and adaptable for a very large purpose, a very large type of business, the reasonable [834] time which you talk about in which to find a purchaser is considerably more than with a vacant lot out here in one of these subdivisions? A. Yes.

Q. So that where in one piece of property you might call 30 days a reasonable time to get a purchaser, on some pieces of property a year or two years is not an unreasonable time? A. That's right.

Q. That is correct, isn't it? A. Yes.

Q. And if you had this piece of property under all of the circumstances I have spoken of, and with all of the attributes you and I have discussed this afternoon, if you asked \$20,000 an acre, it would not be out of line at all, would it?

A. I wouldn't give any answer to that without making an appraisal.

Q. Without—

A. Without appraising it. You cannot appraise it offhand under those conditions. I am exposing it to the conditions I found. But to give an offhand appraisal under different conditions, that would not be very intelligent.

Q. What is it, Mr. Cotton, that I have assumed that you didn't find there at the time? [835]

A. I don't give snap appraisals that way. I think you have to take a lot of things into consideration.

(Testimony of O. W. Cotton)

Q. That is not my question. What was it that I have discussed with you in asking you this question?

A. I thought you asked me if the land wouldn't have sold for \$20,000 an acre. That is asking me for an appraisal.

Q. No, I asked you what it was that I assumed in my questions to you that was different from what you found at the time you made the appraisal. You said you could not agree that the \$20,000 per acre was proper because conditions were different than you and I had been discussing them here. Now, in what respect were they different?

A. Well, I say this, that I can't just tell you any figure, or answer yes to any figure that you might name as to what the property would be worth under certain conditions that I have given no consideration to. I have given serious consideration to figuring out the values on this property, to the conditions as I found them. Now, you are stating an entirely new situation and expecting me to tell you what I think the property is worth. Well, that isn't practical.

Q. Mr. Cotton, can you answer me this, at least: What is there that I have assumed in my questions that is so entirely new?

A. Well, the main point I assume you want to bring out is the fact of a monopoly. You certainly have laid the proposition out as a monopoly. Whether it is here, or [836] a little piece of heaven, or any other place, you suggest that you have got a monopoly, a definite monopoly.

(Testimony of O. W. Cotton)

Q. Yes.

A. Of course, you have disregarded the fact that a man who was going in to buy a large piece of land and put in a large shipbuilding plant can, at no great expense, take the land next door at a very moderate price and extend his channel to it, and that still can be done for a considerable distance down there. So I don't think you have got a monopoly, even if you can do it, in so far as the whole bay is concerned. But if you owned the fee to the property and could sell it, you would certainly have a monopoly in so far as that is concerned.

Q. That is what I am getting at. That would bring a rather substantial and startling price, would it not, under those circumstances?

A. If you had a monopoly, you certainly could get—you would be in a preferred position, and when you could find a taker for it, you certainly ought to be able to get a good price for it.

Q. Now, I take it, as a result of that that you did not consider in making your appraisal that there was involved any such thing as a monopoly at all?

A. As the property—as the other Bay front property is leased, and tied up, it puts the property that is left at [837] a higher value.

Q. Well, in arriving at that theoretical value, and, of course, we are in accord, you and I, that it must be theoretical? A. Yes.

Q. —did you consider, for the purposes of that theory, that there was other similar tidelands for sale or not?

A. Yes, I considered it by comparison with other opportunities to locate industrial plants.

Q. Other tidelands?

(Testimony of O. W. Cotton)

A. Other lands. Other lands.

Q. That wasn't the question. Did you consider that there were other tidelands for sale or not?

A. I didn't consider there were any tidelands for sale. In making this appraisal we have to suppose and we have to consider the same as if it were for sale, but I didn't assume that there were any tidelands for sale, or there would be any tidelands for sale.

Q. Well, then, did you consider the status in arriving at that figure,—did you consider the status of the other tidelands at all, one way or the other?

A. I considered them all on the basis of a fee basis.

Q. Well, you considered it as though all the tidelands would be for sale?

A. No, I considered—maybe I better make myself clear. [838] Probably I didn't use the correct terminology there. I took into consideration the sales that had been made in the other properties that would be good for industrial properties, properties that had been sold on a fee basis that would be good for industrial purposes, some that came to the present tidewater, and I assumed that arrangements could be made to get to deep water, if they wanted to; and others that did not come to tidewater, that were back east of the railroad. I took all of those things into consideration to determine the value of that type of land, giving more value, of course, to property that had greater advantages from transportation and tidewater than I gave to property that did not have such advantages.

Q. Well, you don't make it quite plain to me yet, and perhaps I have missed it, as to whether or not you considered that in arriving at this theoretical value of \$248,000

(Testimony of O. W. Cotton)

you considered that other tidelands could be sold, or whether you considered that the other tideland was as it actually was and could not be sold.

A. I tried to get to this theory, that if we had a purchaser, if we should develop a purchaser for this property, as to what he would pay for this property for all of the uses to which it could be put by comparison to what he would pay for other properties which had been sold.

Q. Now, in arriving at this \$248,000, I take it, from [839] what you have explained to us today, that you didn't arrive at that by computation, but that was simply the best effort that you could make in determining the market value of it, lock, stock and barrel as it stood; is that right?

A. By taking all of the properties that had been sold into consideration, and all of the other elements that I considered of value to form an opinion, I arrived at what appeared to me that a man desiring that property would be willing to pay.

Q. Now, in valuing any piece of property, Mr. Cotton, unless it is a simple thing like a lot in a subdivision, where the prices have been fixed, in valuing, or in forming an opinion of the value, you have in your mind a certain range of values, do you not? A. Yes.

Q. In other words, you look at a piece of land and say, "Well, this piece of land ought to bring about five or six thousand dollars, something like that"; is that right?

A. Yes, by comparison with other properties.

(Testimony of O. W. Cotton)

Q. And in this particular piece of land, when you formed an opinion as to the market value, what range of values did you have in mind? From what to what?

A. I believe it was from about \$1,000 to \$5,000 an acre. [840]

Q. You figured that it was worth somewhere between \$1,000, and not less than \$1,000 an acre, and not more \$5,000 an acre?

A. Some parts of it would be, if you divided it up into slices, some parts would be worth more, and some would be worth less.

Q. I am just talking about the overall value, and what I am trying to get at is this: You say you have finally centered on the figure of \$248,000. But in arriving at that figure, did you have an idea it was between certain figures, that the value would be between certain figures?

A. I took the different units, and I said, "This unit would be worth so much by comparison with these other properties within, we will say, from one to a five-mile radius, and with certain advantages this property would have a certain value," and, "this property would have a certain value," and when I got through, I took the total of it.

Q. You don't mean by that, of course, that you took various parcels and treated them as though they were being sold separately? You don't mean that, do you?

A. Only in figuring out the approximate acreage.

Q. Well, you treated it, however, as a sale of the entire 96 acres?

A. As a whole, that is right.

Q. Under one ownership to one purchaser? [841]

A. That's right.

(Testimony of O. W. Cotton)

Q. In arriving at that figure, did you consider that there was any added value by reason of its being a rather unusually large piece of water-front property?

A. The experience in San Diego has been such that you can't be sure of whether a piece of land will sell better in a large unit or in several small units. Our town isn't as big here as Los Angeles, San Francisco, and Seattle, and sometimes our big ideas don't work out, so that an appraiser is not going to be safe when he says, "Here, this land will be most profitably sold in one piece," because it is quite possible you may get a surprise, and you may find you can sell it better in four or five pieces.

Q. Well, if it was being used for a shipyard, you would want it in one piece, would you not?

A. Yes.

Q. And do you consider as a shipyard, being the highest and best use? A. I wouldn't say that.

Q. Well, do you think that there is some use for which it would be more valuable than as a shipyard?

A. It might possibly be. I wouldn't attempt to determine any one specific kind of industry that could be promoted and that would be the one thing. I took it as an industrial property and gave a range as to what it could [842] be used for, but I wouldn't take the responsibility of saying that there was any one specific type of industry that it would be more valuable for than others.

Q. Well, when you value a piece of property, I have been trying to get at whether you had in mind this property had a possible range of values someplace around \$248,000, or whether you would say this is worth ex-

(Testimony of O. W. Cotton)

actly \$248,000, and not one dollar more, nor one dollar less?

A. Well, that would not be a very sensible appraisal, because if you are considering as to what you might do with a piece of property, all you can do is to arrive at about what you think that you could find a customer for that property for, and if you go to split it down into dollars and cents on transaction of that size, why, you are going too far. An appraisal doesn't go that far. As you said yourself, it is only an estimate after all, and it is an opinion.

Q. Well, was it your opinion that if you had a purchaser that you might get exactly \$248,000, or was it that you might get more or might get less, or get about \$248,000? I am trying to get at how you get this figure of \$248,000.

A. I would say your term is correct, about \$240,000—\$248,000 would be about the figure that one should expect to get for the property.

Q. Might it be less?

A. Why, it certainly might. It might be more. [843]

Q. It might be more. A. Yes.

Q. What you are trying to figure, that is about the average?

A. That would be my estimate as to what it would seem to me that the property would have brought at that date.

Q. But you, in figuring that it might be more, or might be less, you do not use the highest value, but use the average value?

A. We use in making an appraisal about the figure that you think you are going to tell your owner as to the

(Testimony of O. W. Cotton)

true facts of the case, and if in my judgment after giving it full consideration I think that he should get about \$248,000, that is what I tell him.

Mr. Monroe: I have no further questions.

Cross Examination

By Mr. Muir:

Q. Mr. Cotton, following along with the same trend of thought as Mr. Monroe with reference to the Johnson parcel, which is parcel 9,— A. Yes.

Q. —you would say your figure of \$3,225 would be about a fair average of several prices, more or less, that you arrive at to give that figure?

A. I wouldn't say that. I would say that, after [844] giving consideration to the various sales throughout the district and the general market conditions, and the buyers that we had, and the particular advantages of that property, that my estimate of the price that that property should sell for would be \$3,225.

Q. If at the time of your making up your opinion of that value you had known that there was a buyer ready, able and willing to pay \$7,000 for that property, would that have affected your determination of value?

A. I would have to know what was the cause of that. Sometimes a buyer will pay more than a property is worth, and it would first be necessary that I know why he would pay such a price as that, and then before I could determine whether there was some value in that property that I had overlooked, or whether he was just making a mistake and paying too much.

Q. Well, if we assume he made an offer and stood ready, able and willing to buy it for \$7,000?

(Testimony of O. W. Cotton)

Mr. Landrum: That is objected to, if the court please. I don't think there is any such evidence as that. My recollection is that it was after the taking that this offer was discussed, sometime after 1942.

The Court: I don't recall of any firm offer before the date of the taking.

Mr. Landrum: There wasn't, your Honor. [845]

Q. By Mr. Muir: Mr. Cotton, if you refer to this parcel which is just immediately to the south of parcel 9, the part there that runs up to 15th Street and is divided by the ramp part of parcel 9 that is indicated,—

A. That little strip?

Q. That little strip there. A. Yes.

Q. If we assume that in 1942, July or August, a buyer then was ready, able to and willing to pay \$7,000 in cash for that portion, and subsequently renewed his offer two years later and bought it for that figure, would that affect you in arriving at your opinion of value of this parcel 9?

A. Before I could give an answer on that, I would have to know why, because I have seen many instances where people pay too much for a piece of property and are sorry afterwards. So just the fact that somebody wants to pay more than there is any apparent justification for a property does not affect the value. You have got to have some reason back of that.

Q. Well, in this matter he had some two years to think it over, that is, two years elapsed between his two offers. That is, in 1942 he offered to buy it, and in 1944 he again offered to buy it, and at that time it was sold to him.

(Testimony of O. W. Cotton)

Wouldn't that be a determining factor that he was not acting under any pressure or quick judgment?

A. I can't see where you can add anything to the value [846] unless we know what the reason was that made it more valuable. We see many instances where people will pay too much for a property. We see instances where they won't pay enough and don't get it. Sometimes they offer too little, and do get it. But where a person offers more than an appraiser can see the property is worth, you can't change the value, because some person makes a mistake like that. That doesn't affect the value. If there is some reason for it, that is one thing.

Q. What would you say is the reasonable market value? That is, the definition?

A. The market value?

Q. Yes.

A. Well, as I started,—do you want me to repeat what I said a while ago?

Q. Yes, I would like to have you repeat it.

A. All right. The market value is the highest price, in terms of money, for which a property will sell, land, a property will sell, if exposed on the open market for a reasonable time to find a purchaser knowing all of the uses and values to which the property may be put or is capable of being used, and also on the supposition that the seller is willing but not compelled to sell, and the buyer is willing but not compelled to buy.

Q. Very well. Now, assuming this buyer we have been talking about is not forced to buy and the seller certainly [847] were not forced to sell, because two years had elapsed, and that also is evidence of the fact that the buyer wasn't forced to buy and the property was exposed

(Testimony of O. W. Cotton)

for sale on the open market, and there was a reasonable time elapsing for him to make up his mind and to gain full knowledge of all the uses and purposes to which this particular land was adapted, don't you say that \$7,000 offered and paid for this property would be a fair, reasonable market value, as fitting into your definition of market value?

A. I would say that there was something that we didn't know about that caused him to make that offer, and until we knew about it, it would not be practical to change a valuation.

Q. In other words, if you had that fact before you, and we will assume you did have that fact in arriving at your opinion of value, you would not have considered it at all?

A. I would try very hard to find out what the reason was. It is our business to find out all of the things that pertain to the value of the property, and I make it my business to find out why it was valuable, and if there was a value in that little piece of land that we don't know about, why, we should know about it before we make our valuation.

Q. Well, you have stated here that you considered other sales within a five-mile radius in arriving at your judgment as to value, yet you would exclude this particular [848] parcel because it is the only one that is adjacent to it—

Mr. Landrum: Just a moment. If your Honor please, I will have to object to that. Here is a sale two years after November. No one could have known.

The Court: As I remember, that sale was in 1944?

(Testimony of O. W. Cotton)

Mr. Muir: That is correct, your Honor. The offer was made in 1942.

The Court: There was no sale?

Mr. Muir: No sale.

The Court: You are talking about a sale.

Mr. Muir: Yes, your Honor. I see the objectionable portion.

Q. By Mr. Muir: Now, in reference to sales within this five-mile radius, I understood generally from your testimony you referred to sales of property in large plot-tage in reference to determining the value of National City's property; is that correct?

A. Sometimes large properties, sometimes 50-foot lots.

Q. And those were used by you, these other sales, in arriving at your opinion of the value of the National City property?

A. Taking the—I think I should explain that these sales extended from Chula Vista and up to 32nd Street in San Diego. A number of them were right in National City, very close to this property. [849]

Q. Now, you know where the streets or the property at Sampson and Colton is in San Diego?

A. Sampson and Colton, I know approximately, yes.

Q. Would you say that that property is within five miles of these parcels?

A. Well, whether it is or not, it is not comparable.

Q. In other words, I need not cite you any of these sales that took place here, because they are all not comparable?

A. I didn't say so. I said that particular property.

Q. The southeast corner of Sampson and Colton, lots 43 to 48, Block 53, San Diego Land and Town Com-

(Testimony of O. W. Cotton)

pany's addition,—you would state that that property is not comparable, Mr. Cotton?

A. I have got it on the map here. What block is it?

Q. 53. A. 53, Sampson and what?

Q. And Colton.

A. The difference between that property and the subject property is that this, of course, is much nearer to the city of San Diego, and would always, of course, bring a far higher consideration.

Q. Well, how many miles would you say it would be from parcel 9?

A. Well, I should think it would be a couple of miles, [850] two to three miles, something like that.

Q. Yet, you considered other properties in San Diego five miles distant from these parcels we are here concerned with?

A. From the larger parcels or, for the larger parcels. [851]

Q. Are you familiar with this small sale, so to speak, for \$1,750?

A. That occurred in June, 1942, of Lots 31 and 32, Block 83 of Manassee & Schiller's Subdivision, plus part of the railway right-of-way, being .201 of an acre. That is on Main Street, isn't it?

Q. On Main.

A. Yes. That isn't in any way comparable to any of the properties that we subdivided or that we appraised down at National City. There is just no way you can make a reasonable comparison with those properties. I knew of that sale but it isn't possible to compare it.

(Testimony of O. W. Cotton)

Q. That was rental which would have been at about 20 cents a square foot, or \$8700 an acre, wasn't it?

A. Whatever it was. I didn't use it for comparison because it was a different class of property.

Q. It is sort of comparable to Johnson's property, isn't it?

A. It is a different location. Main Street is our main thoroughfare from San Diego to National City and the subject of this property of the Johnsons is not on a main thoroughfare, and you can't compare this at all.

Q. Mr. Johnson's property was right near the water front? Isn't that comparable?

A. Well, it isn't very close to the water front. You [852] have railroad tracks between that and the water front.

Q. It is just across the street, isn't it?

A. Yes; you have got the railroad tracks there.

Q. The railroad tracks come on down the middle of Harrison Street, don't they?

A. I shouldn't consider it a property that is in the least comparable. In looking these properties over, I selected those that I considered were fairly comparable, and I did not make comparison with those that are not comparable.

Q. I presume you took into consideration but excluded these sales where they ran about 8,000 or better per acre?

A. Which ones do you refer to?

Mr. Landrum: If your Honor please, I don't like to object, but it seems to me it is improper for counsel to read figures here, without laying any foundation for them. I object to the form of the question and I object to coun-

(Testimony of O. W. Cotton)

sel continuously reading figures here unless some foundation is laid.

The Court: Some of them have already been propounded in questions to others but that last one I don't recall.

Q. By Mr. Muir: Mr. Cotton, you appraised for the Tavares Construction Company, didn't you?

A. Yes, sir.

Q. That was in 1942? A. Yes. [853]

Q. Did you appraise the Johnson's property at that time? A. No.

Q. When did you first appraise his property?

A. That was on August 20, 1943.

Q. Did you appraise that for the United States Government or for the Defense Plant Corporation or some other agency of the government?

A. I made this for the U. S. Maritime Commission.

Q. Did you make that for the purpose of arriving at a determination of whether or not the rental under the Tavares lease was reasonable?

A. I made it for the purpose of arriving at a fair market value of the property as of that time.

Q. Government counsel asked you about your appraisal approach in this matter and you stated it was upon two grounds, one, comparable properties and, secondly, you considered leases. In respect to Johnson's property, did

(Testimony of O. W. Cotton)

you consider the lease the Johnsons had with Carl Bliss at \$100 a month?

A. We always try in making appraisals to take all matters into consideration and, of course, I took into consideration the fact that those leases were in existence.

Q. How long did that lease run, Mr. Cotton?

A. The one to Bliss? [854]

Q. Yes; the lease to Bliss, that Mr. Johnson got \$100 a month for.

A. As I recollect that, that lease was changed I think. Was it not? Wasn't it changed to \$75 a month and \$35 of that was applied to the addition of another building that was put on there? I think they reduced it to about \$40 a month. Wasn't that the condition?

Q. You should know more about that because you appraised this property upon the basis—

A. That is as I recollect it.

Q. Did you take into consideration the five-year leases that were executed by the Tavares Construction Company and by Carl Bliss, both in favor of the Johnsons?

A. Oh, yes.

Q. One at \$35 a month and one at \$40 per month?

A. I think the \$40 a month one was the one that applied to this property.

Q. Would you use the same percentage of capitalization to arrive at fair market value figure by reference to the rentals, as has been previously discussed here?

A. I don't consider it possible to arrive at a capitalization value on that type of lease. You have a lease there

(Testimony of O. W. Cotton)

that is very much out of line by comparison with anything else in the district. So it looks like they were paying too much. If that was done merely for a war emergency, [855] that is one thing. If the war were to come to an end in six months, obviously, they were paying too much. It would stop. So it isn't practicable in establishing a fair market value of a property to give capitalization on such a rental as that. It just wouldn't work out. While I took into consideration the fact that the owner would be getting, if this continued five years, a very handsome profit on his investment, it would wipe out a good deal of the value. I took that into consideration in giving the value of the land because I gave the value of the land much more than the value of anything else in the neighborhood, and that had a material influence. But I do not consider it would be practical to try to arrive at a capitalization value on a lease of that kind, made under war conditions which might terminate at most any time, and take that as a permanent value of the land. It doesn't seem practical to me.

The Court: I think we will suspend now until tomorrow morning. 9:30 in the morning, ladies and gentlemen. Remember the admonition heretofore given you and keep its terms inviolate.

(Thereupon, an adjournment was taken to 9:30 o'clock a. m., Tuesday, February 25, 1947.) [856]

San Diego, California, Tuesday, February 25, 1947.

9:30 A. M.

The Court: All present. Proceed.

Is there something *ex parte* here?

(Another case called.)

The Court: Now, I think we are all present and you may proceed.

O. W. COTTON,

called as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination

Mr. Muir: May it please the court, I do not wish to ask Mr. Cotton anything further.

By Mr. Sloane:

Q. Mr. Cotton, I would like to ask a few questions on behalf of the San Francisco Bridge Company. I am not interested in the figures that you gave for fee values, and so forth, but I am greatly interested in the value which you gave for leasehold value, which I believe you said was \$18,800. A. Yes.

Q. And that allowed to the San Francisco Bridge Company nothing whatever for their bargain or their bonus or whatever you want to call it? [858] A. Yes.

Q. I believe you said that in arriving at the fee values you scouted around in an area of from one to five miles in diameter to try to locate similar sales of similar property.

A. From adjacent to the property to several miles.

Q. Did that go in all directions, north, east and south?

A. I went south several miles and I went north several miles; east only a few blocks, because east you soon come

(Testimony of O. W. Cotton)

to the business district of National City, and you certainly would not find any comparative sales there that would be worth considering.

Q. However, you didn't go farther west, out into the Bay? A. Not very far, no.

Q. But you did examine values in some transactions up towards the San Diego industrial district?

A. Yes.

Q. Now, did you make the same search in trying to locate leases that had been negotiated about that time or before that time on tidelands?

A. I checked with Mr. Joe Brennan the conditions for leaseholds in San Diego, and I was familiar with the Cal.-Co. lease down near National City. I made what I considered a [859] reasonable check on leases to determine what the general conditions were, to arrive at a fair value.

Q. You did find several parcels that had been lately leased by the City of San Diego to private corporations or individuals?

A. There were quite a number of leases that I checked.

Q. This first search you made, I believe, was in October, 1942? A. Yes.

Q. And at that time you actually were on the ground in question here? A. Yes.

Q. How did you arrive at this figure of \$18,800?

A. I took an estimate of the amount of the cost of building the pier that has been built there, the improvements, in other words, and then I took—made an estimate of the cost of dredging, according to the lease requirements for the dredging of that area, and took the sum total of those and arrived at the cost that it would appear that the Bridge Company should have expended in order to meet that part of their lease. [860]

(Testimony of O. W. Cotton)

Q. By Mr. Sloane: What relationship does that have with the values that they could receive for 18 unexpired years of their lease?

A. I took the position and I take the position that, under the market conditions at that time, it probably would not have been possible for them to have sold their lease or for anyone to have sold their lease at a profit. So that I could see no way that they could be allowed a profit in their lease.

Q. In other words, you figured they would have to pay out under their lease, during the ensuing 18 years, about as much value as they would get out of the lease?

A. No; I didn't say that. If they continued to own or were privileged to continue to own the lease, it is quite possible they might have made untold profits, but that wasn't the point. The point was what would be the fair market value of that lease if sold to some outsider on the open market at that time and, judging by the fact, for example, that the lease next door had defaulted and was not sold and there were 30 acres just south of this property that could be leased and was not leased, and the record of lack of customers for that type of lease in the vicinity of National City, and the fact that the war was on and that it was quite possible, as soon as the war was over, the thing would slip back into its old groove, it would seem to me that there was not an opportunity [861] to sell that lease to anybody else at a higher figure than they had themselves. So that, if we returned to that investment, that would be about as far as we would go.

Q. Suppose their investment was actually \$70,000 instead of \$18,000, would that have made any difference in your estimate?

A. I sent a telegram to—

(Testimony of O. W. Cotton)

Q. I am just asking you the question.

Mr. Landrum: Just a moment, if the court please. I submit the witness should be permitted to answer the question.

The Court: He should get at it directly without stating the details about sending the telegram.

Mr. Sloane: May I have the question read, your Honor?

(Question read by reporter.)

The Court: Don't give the details if you don't agree with the supposition as in real existence, if you know that it isn't. You may answer the question.

The Witness: My answer to that question would have to be no. And I would like the privilege of explaining the question if it is permissible, or my answer.

Mr. Landrum: I submit, your Honor, he can go ahead with his explanation at this time.

Mr. Sloane: The answer is no. I don't see that it calls for an explanation.

The Court: I think not. It was a direct question.
[862]

Q. By Mr. Sloane: You take your view of the market value by reason of the conditions as they were on the ground November 10, 1942? A. Yes.

Q. Will you observe this panorama photograph, Exhibit J, and state whether that is a correct reproduction of what you did see or what was there on the ground in November, 1942?

A. It would be hard to state that that is exactly what I saw on the ground because I saw it from the ground and not from the sky; but, in looking over this panorama yesterday, it seemed to be about what I would expect.

(Testimony of O. W. Cotton)

Q. In other words, you didn't see a vacant area, as would be reflected on the plat on the board, but you saw an active area, with buildings and workmen and machinery and a going concern there?

A. Oh, yes; it was very active.

Q. Did you also notice on the grounds of the San Francisco Bridge Company itself, Parcel 7, signs of activity and a going concern?

Mr. Landrum: Just a moment, if the court please. That is objected to on the ground and for the reason that the activity was on the part of the government of the United States.

The Court: Overruled. I am not saying that that is not true as it is an element in the case. [863]

Mr. Sloane: Referring now to a date particularly prior to November 10, 1942.

A. I don't remember any activity on this parcel. I went down and went over the wharf a time or two and looked around, and there was a small movable shed at the time on the property, but at the times I was there I don't recall any activity on the Bay property.

Q. There was a pier there?

A. There was a pier there; yes.

Q. And gear piled on the shore and machinery?

A. Very little.

Q. I believe you said that you made your original estimate of value here at the instance of the Tavares Construction Company, October 27, 1942.

A. I made two appraisals; one estimate on that date and one estimate before that, I think in September.

Q. Referring now to your October 27, 1942, appraisal, in that I believe you said you took into consideration and

(Testimony of O. W. Cotton)

I understand that is the same appraisal you make now so far as this San Francisco Bridge Company lease is concerned? A. Yes.

Q. In making your valuation then and now, did you take into account the leases which had been entered into by the City of San Diego, to which you referred a few moments ago?

A. Yes; I gave consideration to those leases. [864]

Q. And, in giving consideration, you took into account the rentals called for? A. Yes.

Q. Did you also make an examination of the terms of the city leases as compared to the terms of the San Francisco Bridge Company lease? A. Yes.

Q. Is it a fact that one of those leases that you considered—withdraw that. Is it a fact that there were a number of leases which you considered, and that you enumerated those on page 11 of your appraisal, under date of October 27, 1942?

Mr. Landrum: If your Honor please, if there is any question about this appraisal, I tender a stipulation to counsel. He is cross examining on it. I am perfectly willing that it go in evidence. [865]

Q. By Mr. Sloane: Well, I will not be very long on this. I want to call his attention to the Cal.-Co. lease, for example, which is referred to on page 11. A. Yes.

Q. That provided for a rental of one cent per square foot for the first five years, two cents per square foot for the next five years, four cents per square foot for the next ten years, and five cents per square foot for the last five years; is that correct? A. Yes.

(Testimony of O. W. Cotton)

Q. I believe you remarked that these other leases had been entered into by the City of San Diego within the last three years, as you found?

A. Whatever the reference is. I don't remember all the figures.

Q. Do you have before you the copy of your appraisal?

A. Yes.

Q. Now, the next citation is as to the lease of the San Diego Gas and Electric Company, in which is provided a rental of one cent per square foot for the first five years, two cents per square foot for the next five years, four cents per square foot for the next ten years, and five cents per square foot for the last five years.

Then the next one is San Diego Marine Construction Company, which provides one cent per square foot for the first [866] five years, and one cent minimum or three cents maximum for the next five years, that apparently being a shorter lease, for ten years.

The next one is another short lease, is it not, starting at one cent. The next one is a short lease, starting at one cent. The next one is a ten-year lease on a monthly basis, is it not? The next one is a short lease at one and one-half cents per square foot. The next one is a short lease, a year-to-year lease, at one and one-half cents per square foot.

Taking these into consideration, did you have in mind at the date of this valuation, the comparative rental value of the San Francisco Bridge Company's National City lands?

A. I gave consideration to these leases in arriving at my appraisal.

(Testimony of O. W. Cotton)

Q. Are you aware, or will you follow me, please, as to the actual rental which would be paid under, we will say, a 20-year lease which allowed one cent a square foot on the area involved here, say, for the first ten years and two cents a square foot for the next ten years? That is an element that a willing buyer would figure on and take into consideration, is it not, what rental values would amount to over a period of time?

A. I don't believe I quite follow your question.

Q. Well, perhaps I am a little involved. [867]

A. Yes.

Q. Let's assume that on November 10, 1944, or the day before, you have a prospect, a willing buyer who is interested in acquiring land for the uses to which this particular land was adapted at that time. Now, I assume that he would look at the land as you did, and would see around there the things that you did. He would take into consideration the availability of any other land of a similar type, or the lack of availability. He would get out his pencil and paper and figure what rent it would cost to rent that kind of property, would he not, or what the purchase price would be, if you could buy that kind of property? All of these things would be involved in the mental processes of this willing buyer?

A. Yes.

Q. Now, assuming that, as the evidence shows here, this parcel which was under lease to the San Francisco Bridge Company involved or covered 629,878 feet. That is what the 14½ acres amounts to. If that rented for the first year at one cent a foot, it would mean a rental payment of almost \$6,300, would it not? A. Yes.

(Testimony of O. W. Cotton)

Q. And during the eight years immediately following in the period of the original ten years we are supposing here, with the lowest rental of one cent a square foot, this willing [868] purchaser of the lease would pay out \$50,000 in rent? Does that sound right to you?

A. Well, I would assume that you are correct.

Q. It is eight times \$6,300? A. Yes.

Q. Now, if at the end of the first ten-year period, that is, eight years from the date we are considering, the rent should step up, as all these other rents do, and not step up in five years, but step up after ten, and not step up the 2 and 4 you have, but step up to two cents, then the rent per month would be double what it was before, would it not, or would call for a rental payment of \$12,600 a year, and running for ten years, this willing purchaser of the lease would have to put out \$126,000 in rent, would he not?

A. If your figures are correct, yes.

Q. Or a total expenditure for rent for this term of ten years of \$176,000. Now, we are back on the ground with your willing purchaser of the lease here again, and you, with your well-known powers of salesmanship are pointing out to him the advantages of purchasing this lease from the San Francisco Bridge Company. Wouldn't your presentation, and the consideration of the buyer run along about this line: these improvements have been put in at a cost or a value of \$18,800. National City still has \$7,000 coming to it for rent under the terms of this particular lease. So [869] by an investment of \$25,800 you can procure the right to use this property for the ensuing period of 18 years. Now, you are in competition with people who are going to pay rent, and assuming that our rent is low, that is, one cent a square foot, the first ten-

(Testimony of O. W. Cotton)

year period and two cents a square foot for the next ten-year period, your competitors are going to have to pay out \$176,000 in rent. Don't you think you could have got from this willing purchaser a little something for the value of our bargain, for the bonus? Couldn't you have got two or three or four thousand dollars?

A. You have already got the 30 acres adjoining this land that came clear to deep water, to 30 feet of water, that was not leased, and there were no takers for it.

Q. What land is that?

A. The land belonging to National City right adjoining on the south, and there were no takers for it. It came clear to deep water. This is only on nine feet of water.

Q. Do you mean this is an area south of parcel 3, now?

A. Yes, south of your lower piece here there is 30 acres of land that was not leased.

Q. It wasn't filled either, was it, until the San Francisco Bridge Company filled it?

A. It was filled at that time, yes.

Q. That is a part of the consideration that the San Francisco Bridge Company gave for this lease to the City of [870] National City, isn't it?

A. I don't recall now.

Q. Now, your buyer, in making that investigation and taking those considerations would have taken into account these things, and perhaps other things I would be glad to have you mention, if you wish to. One of them would probably be the relative value of leasing or of buying, would it not, assuming he could buy anything? I want to ask you whether that prospective buyer wouldn't have considered that he might purchase at a price which

(Testimony of O. W. Cotton)

would involve a good bonus to the San Francisco Bridge Company and still be better off than if he would make an outright purchase of the property. Directing your attention, so you will know what I am talking about, to some considerations which you set forth in this appraisal—it is rather voluminous, and I am not too familiar with it, but on page 11 you have a chapter, shall we call it, entitled, “Examples of San Diego Tideland Leases,” from which I was quoting you references a while ago?

A. Yes.

Q. And on page 12, is it not true that as a part of your consideration you took into account the things I am about to read to you here, and that a prospective buyer would naturally and ordinarily take them into account also? Let me see if I quote you correctly here from your written appraisal: [871]

“At first glance it would appear that the rentals charged by the City of San Diego for the use of its tidelands would be placing an extremely high value on these lands, but as a matter of fact quite the reverse is true, because on city tidelands the lessee saves his capital investment in the land and there are no taxes to be paid on the land; buildings and equipment are assessed by the County Assessor at 50 per cent of cost the first year and amortized over the life of the lease. In the lower rental brackets there is a marked advantage in leasing from the city in preference to fee ownership. When time carries the lessees into the higher brackets, the lessees’ increased business may justify the higher rentals; if not, probably some modification will be made.”

Was that your opinion, and did you so express it?

(Testimony of O. W. Cotton)

A. Yes.

Mr. Sloane: That is all.

Q. By Mr. Crouch: Mr. Cotton, did I understand you to say that you had appraised some 150 different appraisals for the United States government?

A. A good many more than that.

Q. Did I hear you correctly, and did you say that in all of your experience as an appraiser you had never yet [872] testified against the federal government?

A. I don't think I ever have. I don't remember to have done so. I am not sure.

Q. You were considerably handicapped in making the appraisals and giving the values that you have testified to here yesterday and today, weren't you?

A. I didn't think so.

Q. You said that as a preparation for arriving at your valuations, you talked with a good many people, one of them a man by the name of Allenger?

A. Well, I talked with—

Q. Yes or no, please.

A. Let me have the question again.

Mr. Crouch: Read it, please.

(The question was read.)

The Witness: Yes.

Q. By Mr. Crouch: Who was he?

A. He was a representative of the Maritime Commission here.

Q. How many different times did you talk with him while you were making this appraisal, approximately?

A. Oh, I don't know. I suppose a half a dozen times, or more; maybe a dozen.

(Testimony of O. W. Cotton)

Q. You have been in court and heard some of the testimony, haven't you? [873]

A. In this case? Yes.

Q. Were you here when I pointed out to the jury the various clauses in the contract of our clients, the Tavares people?

Mr. Landrum: Now, if the court please, I don't like to interrupt, but certainly this witness has not testified with reference to the Tavares contract, and it is not proper cross examination.

The Court: The objection is sustained.

Q. By Mr. Crouch: As a matter of fact, that appraisal that you made in 1942, in September, was made on behalf of the United States government for the very purpose of determining how much money they had to put up in court in this very case; is that not the truth?

A. I am not sure on that.

Q. And the lower you made your appraisal, the less money they would have had to put up; isn't that true?

A. That had nothing to do with it.

Q. No, you just answer my question, and I will do the arguing. A. Let me have the question again.

Q. Read it, please.

(The question was read.)

A. I don't know. [874]

Q. By Mr. Crouch: Well, do you know that your fees for making that appraisal were paid by the United States government? A. They were.

Mr. Landrum: I have no objection whatsoever to the letter, if your Honor please, and I am perfectly willing to stipulate with counsel how much Mr. Cotton got for his job. I will agree he was paid and paid well.

(Testimony of O. W. Cotton)

Mr. Crouch: Do you want to argue the case?

Mr. Landrum: I am not arguing. I will agree with you.

Mr. Crouch: Then, can you contain yourself for a while?

Mr. Landrum: I can contain myself. Go ahead.

The Court: You have done pretty well so far, gentlemen. I think you had better not keep it up.

Mr. Crouch: What is the next number, Mr. Clerk?

The Clerk: Exhibit X.

Mr. Crouch: Exhibit X reads as follows—

Mr. Landrum: May the record show, if your Honor please, it is in by stipulation?

The Court: Yes; it may so show if he is going to read it to the jury.

Mr. Crouch: I think the record should show that when he stipulated to it.

The Court: Don't argue in court.

Mr. Crouch: Leaving off the immaterial parts, it is a [875] letter from James H. Roper, Division Engineer of the Defense Plant Corporation, addressed to Mr. Gregory D. Smith, Administrative Manager of the Tavares Construction Company.

“Dear Mr. Smith:

“Reference is made to your letter of September 28th, with which was enclosed invoice of Mr. O. W. Cotton in the amount of \$500, covering appraisal services in connection with the site for the project, and also to Mr. Seabrook's letter of October 17th, advising that additional services of Mr. Cotton had been furnished at an additional charge of \$500, mak-

(Testimony of O. W. Cotton)

ing the total cost of the appraisal reports \$1,000. We regret that it was necessary to hold for so long a time the original invoice of Mr. Cotton but, in view of the fact that no funds were available for paying it, we were unable to approve it. As you know, the condemnation is being done through the Maritime Commission, which will pay the costs and take the title to the land. An appraisal fee would seem to be a proper charge against the acquisition of the site but we believe it should be paid by the Maritime Commission. Accordingly, we are returning the invoice of \$500, dated September 14th, for your disposition."

May the record show, Mr. Landrum, that this letter is received by stipulation?

Mr. Landrum: I have no objection to it except what they have written on it with lead pencil, your Honor. [876]

Mr. Crouch: I will rub that out. I didn't notice that it was there. This will be Exhibit Y?

The Clerk: Exhibit Y; yes, sir.

Mr. Crouch: This is a letter to Mr. O. W. Cotton, written by the Tavares Construction Company, dated October 15, 1942.

"Subject: Appraisal of land as shown on key map.

"Dear Sir: We are in receipt of your bill in the amount of \$500 to cover your charge for the appraisal report which was submitted to us on September 14, 1942,—"

Q. That was at the date you submitted your appraisal, was it? A. The first appraisal?

(Testimony of O. W. Cotton)

Q. Yes.

A. The first appraisal was submitted September 14, 1942.

Mr. Crouch:

“—and have transmitted that bill to the Defense Plant Corporation for payment. With reference to your letter of October 3, 1942, wherein you make a reduction in your charge for making an additional detailed appraisal on the properties outlined in your letter, we wish to advise you that you are authorized to proceed with the additional detailed appraisal and report for the sum of \$500, it being understood that the costs of the two reports are not to exceed \$1,000. It must be understood that this appraisal is made in connection with the condemnation proceedings and embraces [877] the area as shown on the key map, Sketch 25, now and to be occupied by our shipyard, and that payment for this work will be made by the Defense Plant Corporation or the U. S. Maritime Commission. And I am of the opinion that this charge will be liquidated under the funds made available for the carrying on of the condemnation proceedings, which funds will be authorized by one or the other of the governmental agencies mentioned above. It is to be understood that the report on the appraisal will be completed within 15 days from date. I trust that this meets with your approval.”

And may the same stipulation be made with regard to this letter?

Mr. Landrum: There is no objection except they have some pencil writings on it.

(Testimony of O. W. Cotton)

Mr. Crouch: You don't care for that circle being erased, do you? Is this Exhibit Z?

The Clerk: Yes; Exhibit Z.

Mr. Crouch: It is a letter from the Tavares Construction Company to Mr. James Roper, Division Engineer of the Defense Plant Corporation, dated October 17, 1942.

"Dear Sir: In accordance with our telephone conversation of October 15th, I wish to advise you that the U. S. Maritime Commission has decided to condemn all property on which facilities are being constructed by us, under agreement of lease, Plancor 407, National City. It is the opinion of all [878] concerned that the rental for use of this real estate is exorbitant and, in order to arrive at a fair price for either rental or acquisition in fee simple, condemnation proceedings are necessary and have been so approved by the U. S. Maritime Commission. In order for a decision to be made to condemn this real estate, it was necessary to employ an appraiser, of recognized ability, to make a preliminary report. Mr. O. W. Cotton, of San Diego, was employed to make this report for a fee of \$500, and his bill has been transmitted to you for payment. In view of the fact that the condemnation proceedings are to be instituted, and in order to present an intelligent case before the court, a detailed appraisal must be made, for which Mr. O. W. Cotton has been employed for the sum of an additional \$500. The total cost for the preliminary and the detailed report is \$1,000. In the interest of expediting the acquisition program and economy and in view of the great need for ships, we have authorized an appraiser to proceed with all

(Testimony of O. W. Cotton)

haste to the end that the property involved may be condemned at the earliest possible date. We respectfully request that you honor Mr. Cotton's invoices."

Q. I was considerably interested yesterday, Mr. Cotton, in what you had to say on the subject of monopoly, and I think that I heard you say, when you were asked by some of counsel, if it were not a fact that all tidelands in California were held subject to a trust, under which cities or the [879] State are prohibited from alienating or selling them, and I think that you said that that was true with only one or two exceptions. Did I hear you correctly?

A. I understand there are several exceptions to that. I am not personally familiar with them.

Q. That is what I was trying to find out about. Those exceptions, Mr. Cotton, were instances where the federal government has condemned and later found no use for the property and sold it? Isn't that the fact?

A. I don't know.

Q. But, if the program that is outlined in these letters that I have read were carried out and the government, pursuant to what is mentioned in these letters, as set forth in Plancor No. 407, had condemned the site acquired by the Maritime Commission or the Defense Plant Corporation, and then, when they had no further use for the building of ships, were to sell the plant and all the lands to the Tavares Construction Company, then the Tavares Construction Company would be under one of those exceptions that you told about?

Mr. Landrum: That is objected to, if the court please. It is not proper cross examination.

The Court: Sustained.

Mr. Crouch: That is all.

(Testimony of O. W. Cotton)

Redirect Examination

Q. By Mr. Landrum: Mr. Cotton, I notice that counsel [880] on the other side of this lawsuit, including the Tavares Construction Company, including the City of National City, and including the San Francisco Bridge Company, all have a copy of your original appraisal of September 14, 1942. Did you notice that?

A. Yes.

Mr. Monroe: I object to that as immaterial.

The Court: Overruled.

Q. By Mr. Landrum: Mr. Cotton, how do you suppose they got it?

Mr. Monroe: I object to that as immaterial.

The Court: Overruled.

The Witness: I delivered several copies to the people that employed me.

Q. By Mr. Landrum: Mr. Cotton, up until you came into this court room to testify for the government of the United States, did either one of those parties, either the San Francisco Bridge Company, the Tavares Construction Company, the City of National City or Carl Johnson, ever state to you they were dissatisfied with that figure and that appraisal? A. No.

Q. Mr. Cotton, counsel has discussed with you the question of costs of a structure, stating to you in the question which he put to you that it cost \$70,000 to dredge this [881] land and a certain amount of money to build that pier. In the appraisal of land, in reaching a conclusion with respect to the fair market value of it, what relationship, if any, does the cost of a structure have to its market value some years later? A. Very little.

Q. Why?

A. In this instance, the City of National City demanded in its letters that the San Francisco Bridge Com-

(Testimony of O. W. Cotton)

pany dredge to 9 feet depth in the channel. I made an endeavor to find out from the Bay Bridge Company what their cost of that dredging was. In reply to my telegram, they would not answer that question. They did state that they dredged to 13 feet but from the fact that the requirement was only 9 feet, it was not possible for me, in the absence of any knowledge of costs, to give them any credit for any more than the 9 feet that was contracted for in the lease.

Q. Mr. Cotton, just to put it to you so I think we will all understand it, if they spent \$2,000,000 to build a sanitarium for mental patients down here where all of these airplanes fly around, do you think it would be worth \$2,000,000 for purposes down there?

A. Apparently not.

Mr. Landrum: That is all.

Mr. Monroe: May I inquire, your Honor? [882]

The Court: Yes, sir.

Recross Examination

By Mr. Monroe:

Q. Mr. Cotton, did you give a copy of that appraisal of yours to Mr. Johnson, ever? A. No.

Q. Did you give one to the San Francisco Bridge Company? A. Certainly not.

Q. Did you give one to National City?

A. Certainly not.

Q. You don't expect, then, that they could have complained of what was in something they didn't see, do you?

A. I am not supposing.

Mr. Monroe: That is all.

Mr. Landrum: That is all, Mr. Cotton. Thank you, sir.

Now, Mr. Schmutz, come on up.

GEORGE L. SCHMUTZ,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: George L. Schmutz.

Direct Examination

By Mr. Landrum:

Q. Where do you live, Mr. Schmutz? [883]

A. North Hollywood, California.

Q. How long have you lived there?

A. 25 years.

Q. How old a man are you?

A. 54 in August.

Q. What is your business or profession?

A. I am a licensed real estate broker and an appraiser.

Q. Will you sketch briefly for this court and jury your experience in connection with your real estate brokerage business and also with relation to your appraisals and giving particular reference, Mr. Schmutz, to lands and properties similar in character to those with which we are here concerned?

A. Generally speaking, since coming to California 25 years ago, I have made numerous appraisals for various employers, some of whom are or were the United States of America, the Navy Department, the War Department, the Justice Department, Reconstruction Finance Corporation Mortgage Company, the Defense Plant Corporation, the Federal Works Agency, the Federal Home Loan Bank, and also for the State of California, the Department of

(Testimony of George L. Schmutz)

Finance, the Department of Public Works, the Building and Loan Commissioner, and also I have made appraisals for the Territory of Hawaii, for the Attorney-General, for the County of Los Angeles, for the City of Los Angeles, the cities of Beverly Hills, Southgate, Long Beach, Lynwood, Glendale, Burbank and others. I have also made appraisals for [884] many private employers, some of which are the Standard Oil Company of California, the Union Oil Company, the General Petroleum Corporation, the Petroleum Securities Corporation, the Title Insurance and Trust Company, the Santa Fe Railway Company, the Union Pacific Railroad, Lockheed Aircraft Corporation, Forest Lawn Memorial Park Association, the Los Angeles Turf Club, the Los Angeles Investment Company, the California Bank, the Capitol Company, the Honolulu Plantation Company at Pearl Harbor, and the Detroit Aircraft Corporation, of Michigan. I am a member of the Los Angeles Realty Board and was chairman of its appraisal committee in the year 1937. I am also a member of the San Diego Realty Board and have been for several years. I am a member of the California Real Estate Association and was chairman of its appraisal division in 1934. I am a member of the National Association of Real Estate Boards and a member of the American Institute of Real Estate Appraisers, the national organization. I was chairman of its education and research committee in 1938. I was its national president in 1940.

Q. Now, Mr. Schmutz, we are particularly interested here in your work here in San Diego. I understand you to say that you are a member of the San Diego Real Estate Board?

A. I am.

(Testimony of George L. Schmutz)

Q. Now, give us some of the particular studies and appraisals that you have made in San Diego and in that parti-[885] cular vicinity.

A. Well, perhaps this may be in and out of San Diego. If I may, first, I will tell you about outside.

Q. Yes; go ahead.

A. I have made an investigation of the Los Angeles Shipbuilding and Drydock Corporation property in Los Angeles Harbor, also the Naval Fueling Wharves 1 and 2 in Los Angeles Harbor, also the Outer Harbor Dock & Wharf Company property in Los Angeles Harbor, also the Kerckhoff-Cuzner Lumber Company property in Los Angeles Harbor. [886]

Q. Wait a minute. Did you find that there was some water-front property privately owned in Los Angeles Harbor that you appraised?

A. Yes, sir, the Kerckhoff-Cuzner Lumber Company property, which I appraised for the Standard Oil Company, who were considering its purchase.

I also appraised the Victory Pier in Long Beach Harbor, which was built by the Army for loading ammunition destined for Pacific Theatre of War, to set the price for sale by the Army to the City of Long Beach.

I have also appraised various privately-owned tidelands.

Q. What are they, now?

A. On San Francisco Bay in and near the City of Richmond.

Q. Go ahead and tell us what they are.

A. Along San Francisco Bay, on the east side of the Bay, near the shipyards at Richmond there were a number of parcels of privately-owned tidelands. I have particular reference to some which I appraised there for the

(Testimony of George L. Schmutz)

Navy in connection with the acquisition of a naval fueling depot at Winehaven.

I have particular reference to one parcel of land which has been available for sale, available for purchase, for the past 15 years, a 100-acre parcel of tidelands, which is situated between the Santa Fe Railroad Company's long pier at Richmond and the pier, the loading pier, of the Standard [887] Oil Company at Richmond. Neither one of those companies were interested enough to pay the taxes or to buy this property. Along in that area are a number of other parcels of tidelands. Some of it is submerged to a depth of two, three or five feet, and some of it has a rather considerable depth right at the shoreline. That is particularly true of a number of properties which were sold about 1942 at Point San Pablo on San Francisco Bay, and a number of industries moved in, fish reduction works, yacht harbors, and others. I made appraisals of those properties and know the prices at which they sold, and at which other properties, similar properties and other tidelands could be purchased.

Q. All right. Go right ahead.

A. I also made appraisals of Winehaven industrial uplands and tidelands on San Francisco Bay adjoining the Standard Oil Company's refinery at Richmond, for fueling naval vessels.

A also made an appraisal of the land occupied by the Todd-Seattle shipyard in Seattle Harbor.

I also made studies of the prices paid for lands for two shipyards in Portland, Oregon; one the Swan Island shipyard; the other, the Vancouver shipyard.

I also made an appraisal of the land occupied by the Brown shipyard in Houston, Texas.

(Testimony of George L. Schmutz)

I made an appraisal of water-front property along the [888] Hudson River in Hoboken, New York, directly across the river from New York City.

As regards this particular area I have made appraisals. Some of the appraisals which I have made in San Diego are as follows:

One, the Thirty-Second Street store-yard of the San Diego Gas and Electric Company, which is right close by National City, in the Navy destroyer base, which is now known as the repair base.

Another property in that same general vicinity at the destroyer base, which was then owned by the San Diego Brewing Company.

At the destroyer base I made an appraisal of lands just below the subject properties, which were purchased by the Rohr Aircraft Corporation in San Diego Bay.

Now, these last three-mentioned appraisals that I made were made in the spring of 1942. The Thirty-Second Street yard at the San Diego destroyer base was property being condemned by the government for the destroyer base, and I made the appraisal for the property-owner, the San Diego Gas and Electric Corporation. The property across the street was owned by the San Diego Brewing Company, and that was condemned by the government for the expansion of the destroyer base. I made that appraisal for the property-owner, the Brewing Corporation, when the Navy took it. [889]

I also made an appraisal of several parcels along Pacific Highway at the Marine Base, which were taken for the Consolidated Parts plant, the parts plant of the Consolidated Aircraft Corporation. I also made an appraisal of property at Mission Bay, which was taken for a hous-

(Testimony of George L. Schmutz)

ing project. I also made an appraisal of the Spear Harbor property at Barnett and Midway, which was taken for a housing project. I also made the original appraisal in 1939, I believe, for the lands taken for the Linda Vista housing project on Camp Kearney Mesa. I also made an appraisal of the land taken for Camp Elliott, the United States Marine Corps base on Camp Kearney Mesa, and appeared in this court as a witness for the property-owners. I also made an appraisal of the land taken, that is, the old Camp Kearney, for the expansion of Camp Elliott out at the original World War I Camp Kearney. I made an appraisal of the land near El Cajon, which was taken for the parachute school which was later established there. I made an appraisal of the privately-owned lands of the Lyon Van & Storage Company and the warehouse in the south industrial district on K Street from Fifth to Sixth Street; also made an appraisal of the Chinese Gardens Cafe at Rosecrans, which was taken for the parts plant of the Consolidated Aircraft Corporation.

Q. Now, Mr. Schmutz, I think that will give us sufficient information. There has been some discussion in this [890] case, sir, with relation to plottage value, or with relation to the fact that there is a large body of land here, consisting of some 96 to 100 acres. Now, in connection with your work throughout the State of California, have you found any industrial plants in Los Angeles, or any place else that you know of, that has that large an acreage? Discuss that with us a moment.

A. As regards size, in the Los Angeles area, for illustration, with possibly one or two exceptions, of which I am aware, the maximum size of land used by any industry is by the tire manufacturing industry. That would be

(Testimony of George L. Schmutz)

Goodyear, Goodrich, Firestone, and the U. S. Tire Company. Those plants range, or the land area is from 30 to 34 acres. Now, as a war measure there may have been built some synthetic rubber plants or styrene plants which may provide slightly more than that, but I think it is reasonable to say that in the Los Angeles industrial area perhaps 99 per cent of all of the land industrially used would comprise, we will say, two acres or less. Unquestionably it would not be as much as five acres for 99 per cent of all the industrial land in the Los Angeles industrial area.

Q. Now, Mr. Schmutz, in connection with your work as an appraiser throughout the country, and in arriving at your conclusions with relation to values of property, what is it that, in your opinion, has the greatest control over [891] the price to be paid?

A. Supply and demand.

Q. Will you discuss that with us just a moment?

A. Well, supply and demand are utility and scarcity. A thing must possess utility before it can have value, and at the same time it must be scarce relative to the supply of it.

Now, for illustration, air has the greatest possible utility, but commands no price because there is more than plenty of it. But, on the other hand, mosquitoes are scarce in the wintertime, but nobody will pay anything for them because they lack the element of utility. So it is whenever a market is surfeited with any particular type of property, and it may be oranges, or apples, or anything else, that the price is low, but whenever the supply is limited relative to the demand for it, the price rises; and as the demand increases without the supply increasing,

(Testimony of George L. Schmutz)

then the price gets greater. So it is the utility and the scarcity relative to the supply and the demand.

Q. Now, going on, did you make a particular study and investigation in order that you might come into this court room to give us your opinion of the fair market value of the land and interests thereon with which we are here concerned? A. Yes, sir.

Q. Will you tell us for whom you made that study? [892] Who hired you?

A. I was employed by the Lands Division of the Department of Justice.

Q. And you are employed by it today, are you not?

A. I am.

Q. Now, when did you start in on it?

A. It was in February of 1945 when I made my appraisal. However, a great deal of the factual data, in fact, I think most of the factual data which I had was gathered by me in the summer of 1942 in connection with other appraisals I was making in the vicinity for the San Diego Gas and Electric Company, for the San Diego Brewing Company, and in connection with the Rohr Aircraft appraisal.

Q. Well, were you generally familiar with this particular land prior to that, in a general way?

A. Yes. In my first—in my assignment, I believe, for the San Diego Gas and Electric Company I heard that just shortly prior to that the City of National City had made a lease to the Tavares Construction Company and, accordingly, I interviewed Mr. Ireland, who was the City Engineer of National City at that time, and Mr. Dale Smith, who was City Clerk. In fact, I saw those

(Testimony of George L. Schmutz)

gentlemen on June 4, 1942, to get information relative to the first of these leases.

Q. Now, will you go ahead and tell us what you did in making your investigation? [893]

A. In addition to talking to these gentlemen for the purpose of finding out the terms and conditions of that first Tavares lease, parcel 1, I also discussed the matter of tideland leases with the Harbor Department of the City of San Diego, got a copy of the map, and all of the tideland lease data, and I have a complete record, I believe. And from the court house records and the title company I acquired data relative to some twenty-five sales of uplands in the general vicinity, and verified the sales price and the conditions from either the seller or the buyer or the broker who negotiated the transaction.

I made an inspection of the subject lands in company with Mr. N. J. Allenger, who at that time was resident plant engineer for the United States Maritime Commission, and from Mr. Allenger I received a set of some fourteen plans and sketches of the land and the improvements thereon, as they had been.

I made an analysis of the sales which had taken place for the purpose of ascertaining the then current price of the uplands. And when I speak of uplands, I mean those lands landward of the main high tideline which can be bought and sold.

I also made a study to ascertain the relationship between the value of the so-called uplands and the value of tidelands, that is, the relationship one to the other, and [894] I made a study of the trend of the value of industrial lands in the San Diego area, metropolitan area, which, of course, would include National City, during the war era.

(Testimony of George L. Schmutz)

I made a classification of the lands involved in this action into three groups for the purpose of my evaluation; those which I call class 1 lands, and give a certain rate per acre, and those are all of the lands which are 500 feet or more distant from the United States bulkhead line, and the second group, class 2, lands which are all lands within 500 feet of the U. S. bulkhead line, and also, the third would be the class 3 lands, which are lands under water, submerged lands.

I calculated the area of the land in each of these classes. I determined from sales the indicated value of these lands, based upon the prices at which other properties were selling, for the purpose of computing the total value of the 96 odd acres involved in this particular action.

Q. Now, Mr. Schmutz,—

A. That is what I did.

Q. Yes. Then I am going to ask you just to tell us, briefly, what I term in the parlance of the street the workings of your mind. Did you have to kind of think of how long the war was going to last?

A. Yes, I made a prediction as to the end of the war. As a matter of fact, I had to make a prediction as to how [895] long that war would last in February of 1942. That was nearly a year before I was engaged in this action, and that was in connection with the valuation of the Santa Anita Racetrack, which was taken as a center for the evacuation of enemy aliens. The Japs were placed in a concentration camp there temporarily while they were being sent away, and in that connection it was necessary to make an estimate as to how long the war would last, for the purpose of making a judgment as to how long that

(Testimony of George L. Schmutz)

racetrack would not operate. I made my estimate and I missed it by four and one-half months, I believe.

In that connection, I did the same here. Of course, I had no reason to change my opinion that the war would be over, that is, that V-J Day would be January, 1946 instead of August, 1945, and that the great demand for these particular lands of National City as a war measure would probably cease at that time, after we reverted from a war economy to a peacetime economy.

Q. Now, Mr. Schmutz, let's get along now to your sales investigation. By the way, while we are on that, what methods do you appraisers use to approach this question of the value of land?

A. There are three conventional approaches to the values estimate, and that which you use, whether you use one or all of them, would depend upon the data available, and that [896] to which you would give the greatest weight would depend upon the nature of the property, and we might say, the reasonableness of the data possessed.

Of course, those three methods,—one is the cost method; second is the comparative method, or method in which value is based upon the sales of similar properties; and the third is the income capitalization method, which is purely a discounting process.

Now, in this particular connection here, it seemed to me, that is, it was my opinion that the most persuasive evidence of the value of this property was the sales method, that is, the price at which other lands had sold or at which other lands could be purchased. However, I did make an estimate of the value that was indicated by cost, that is, if this land was purchased before the government filled it up, and then the money was spent to go ahead

(Testimony of George L. Schmutz)

and to fill the land to the level at which it was at the time I appraised it.

Q. All right, Mr. Schmutz. Now, which one of those methods of approach did you consider to be the best for your purposes, so that you could arrive at a better opinion in this particular instance?

A. The best indicator of value, in my opinion, and the one least subject to wild error would be the comparative method or the method in which I formed an opinion of the value of the property based upon the sales at which other [897] properties had been sold, or at which other properties could be purchased.

Q. All right. Did you find some sales?

A. I did.

Q. Would you tell us, just briefly, about how many and where they were located, without taking too much time, please?

A. Oh, as regards sales, I had fifteen parcels in San Diego in the San Diego city industrial district, four in the National City industrial district, and six in Chula Vista, but of that group of sales there were three in particular which were nearby that were the best indicators that I had.

Q. Now, will you give us those three particular sales, giving us the name of the seller, the name of the buyer, the date of the sale, and just a short description of the property, so we can check it, if we want to?

A. One is the sale I refer to as my Arbitrary Map No. 27. It is southeasterly of 32nd Street in the Sewage Disposal Plant area. The legal description is Block 68, except Lot 33 and except a small triangular parcel at the southwest corner. The land comprises an area of 3.764

(Testimony of George L. Schmutz)

acres. The transaction: the land was sold on October 29, 1940. There were several sellers in there. The purchaser of all of these was the City of San Diego. The price was \$5,235 or \$1,390 per acre.

Mr. Monroe: Now, your Honor please, I move to strike [898] that evidence as improper.

The Court: I think so, the valuation.

Mr. Landrum: Yes.

The Court: You should not read that. I think you should answer the question.

Q. By Mr. Landrum: Yes, Mr. Schmutz, leaving out the price at which it was sold, please, sir.

A. The source of my information was Mr. E. H. Brooks, the right-of-way agent for the City of San Diego.

The second sale—

Mr. Monroe: Now, just a moment, please. We will object to any further testimony as to price on any other sales as immaterial and improper evidence.

Mr. Landrum: Oh, I am sure he will not give it again.

The Court: You had better interrogate him. He may give it if he is just reading it there.

Q. By Mr. Landrum: Mr. Schmutz, the question which I asked you is this: Will you give us these three particular sales, and give us the name of the seller, the name of the buyer, the date of the sale and the legal description, leaving out the price at which you know it was sold.

A. My Arbitrary Map No. 1 in National City is the block bounded by Third, Fourth, Wilson and Harding.

(Testimony of George L. Schmutz)

The legal description is Block 123 in the City of National City. The land is 250 feet by 250 and involves 1.435 acres. There [899] were no improvements. It was sold on May 5, 1941. The seller was H. H. Myers. The buyer was Fred Stall. The source of my information was the Escrow Department of the Bank of America in San Diego.

My Arbitrary Map, National City No. 3 is next. The location is near the southwest corner of the city between 24th and 25th Streets, Cleveland to Harrison Avenues. The legal description is Block 281, National City, except the railroad rights-of-way. The land has an area of 50,275 square feet, being 1.154 acres. There were no improvements. The land was sold on April 1, 1942. The seller was the San Diego and Arizona Eastern Railway Company. The buyer was Plywood Structures, Inc.

Q. Now, Mr. Schmutz, for what purposes did you make this appraisal?

The Court: Which one are you referring to?

Mr. Landrum: The appraisal that he said he made as a result of his investigation. I asked him: For what purpose did you make your investigation to come in here and testify.

The Witness: The purpose of my investigation and subsequent appraisal was to inform the government as to my opinion of the fair market value or the just indemnity to which these parties were entitled.

Q. By Mr. Landrum: All right. What is your understanding of the definition of fair market value? [900]

A. Fair market value is the highest possible estimate, in terms of money, which a property will bring if exposed for sale on the open market, allowing a reasonable time

(Testimony of George L. Schmutz)

to find a purchaser, who buys with knowledge of all the uses to which it is adapted and for which it is capable of being used.

Q. Now, Mr. Schmutz, in the considerations which you used here, did you take into consideration that this particular land with which we are here concerned is tideland, or some of it, and that a fee simple title was going to pass to that assumed purchaser, in your definition of fair market value? A. I did.

Q. From your experience in connection with the buying, handling, selling and appraisal of real estate, and your own personal inspection of the lands with which we are here concerned, known as the Johnson lands, do you have an opinion of the fair market value of that land on November 10, 1942, giving to it all the uses for which, in your opinion, it was suitable or available on November 10, 1942? A. I have.

Q. And what is your opinion of that value, please, sir?

A. \$3,448.

Q. \$3,448. That is the Johnsons. All right.

Mr. Schmutz, from your experience in connection with the buying, selling, and appraisal of real estate, and [901] your own personal inspection and study, of which you have told us, do you have an opinion with relation to the fair market value of the lands known as the National City lands as of November 10, 1942, leaving out, however, any increase or increment in that value due to the expenditure of money upon it by the government of the United States prior to November 10, 1942,—the entire City of National City, including the San Francisco Bridge Company?

A. Yes, sir, I have.

Mr. Landrum: All right.

(Testimony of George L. Schmutz)

Mr. Sloane: Your Honor please, there is one element which is involved in this question, which he has included in a number of other questions, and I am sure counsel will be glad to define and tell us what he refers to in the allegation as to the improvements made by the government, and I think the court and counsel might well instruct or inform the witness that we are referring to improvements as a part of the project, and not as to a previous project, such as the dredging of the channel.

Mr. Landrum: We understand that, your Honor, and it is so intended.

The Court: I think it should be made clear, because there was testimony by one of the witnesses on behalf of the San Francisco Bridge Company, one of the members of the Bridge Company, the corporation, as to dredging that had been [902] done there before this project was contemplated, so far as the record shows.

Q. By Mr. Landrum: As a part of this particular project itself, Mr. Schmutz, leaving out anything that had been done prior by some other work by the government, and also giving the San Francisco Bridge Company credit for whatever it did itself, have you got an opinion on that? A. I have.

Q. Tell us what it is.

Mr. Monroe: We will object to that as no proper basis because they now state that he has to leave out of consideration anything that was done before this project was commenced, and we submit that is no proper basis.

Mr. Landrum: No, I did not.

The Court: We will have the question read to see if that is the correct interpretation to be placed upon it.

(The record was read.)

(Testimony of George L. Schmutz)

The Court: I think that is sufficient. I think you had better reframe the question and make it one interrogation.

Mr. Landrum: All right, sir.

Q. By Mr. Landrum: Mr. Schmutz, from your experience in the buying, selling and appraisal of real estate and your own personal inspection of this subject property, do you have an opinion with relation to the reasonable and fair market value thereof as of November 10, 1942, giving to it all uses [903] for which, in your opinion, it was suitable or available as of that date, but leaving out therefrom any increase or enhancement thereof by virtue of moneys spent by the government of the United States in the construction of this very project?

A. Yes, I have.

Q. What is that opinion?

A. In my opinion, the fair market value of the property on that day, excluding the improvements such as were placed upon the land and the improvements in the land such as the finished grading and the establishment of sewer lines and water lines and other physical improvements was \$240,258, including the interest of the San Francisco Bridge Company.

Q. All right. Now, in your figure of \$240,258, what do you include for what, in your opinion, was the just compensation for the taking of the leasehold interest of the San Francisco Bridge Company on November 10, 1942?

A. \$28,919.

Mr. Landrum: \$28,919. You may cross-examine, gentlemen.

Mr. Muir: I will refer the examination for the Johnsons, if the court please.

(Testimony of George L. Schmutz)

Cross Examination

By Mr. Monroe:

Q. Mr. Schmutz, you stated you were a member of the San Diego Realty Board? [904] A. I did.

Q. Have you ever resided in San Diego County?

A. I have not.

Q. Have you ever, as a real estate broker, sold land in San Diego County? A. I have not.

Mr. Monroe: I have no further questions.

Mr. Crouch: We have no further questions.

Mr. Sloane: I have no further questions.

Mr. Muir: No further questions.

Mr. Landrum: That is all, Mr. Schmutz. Thank you, sir.

(Witness excused.)

Mr. Landrum: You Honor please, I do not know, but does your Honor intend to take a morning recess?

The Court: Yes. It is about time. We will recess for a few minutes, ladies and gentlemen. Remember the admonition.

(A short recess was taken.) [905]

The Court: All present. Proceed.

Mr. Landrum: If your Honor please, having in mind your Honor's rulings heretofore made under the general objection that I made with relation to the Tavares Construction Company in this case, and reserving any rights that we may have under that previous objection, if we may, we will now proceed with the Tavares Claim in this case. We will call Mr. Shattuck.

CHARLES B. SHATTUCK,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Charles B. Shattuck.

Direct Examination

By Mr. Landrum:

Q. Where do you live, Mr. Shattuck?

A. At 1251 South St. Andrews Place, Los Angeles, California.

Q. How long have you lived in Los Angeles?

A. I was born in Los Angeles.

Q. How old a man are you? A. 47.

Q. What is your business or profession?

A. I am a realtor and a real estate appraiser.

Q. Will you sketch briefly for this court and jury your experience as a realtor and as an appraiser as that experience [906] relates to the question with which we are here concerned, this valuation?

A. I entered the real estate business in Los Angeles in the year 1923. Prior to that time, from 1919 until 1923, I was associated with the Shattuck Construction Company, engaged in building railroads, tunnels, dams and irrigation works. After entering the real estate business, I formed a company known as the Shattuck Company, which does a general real estate brokerage business in the city of Los Angeles. I have confined a good deal of my own personal time to evaluation work, particularly since about 1925. During that time, I have appraised practically all types of real property. In the city of San Diego some of the appraisals which I have made

(Testimony of Charles B. Shattuck)

have been the First National Bank Building and several other business blocks along Fifth Avenue, the U. S. Grant Hotel, the Pickwick Hotel and the Embassy Hotel, and also, in 1939, I believe it was, I appraised the land which was acquired for the Linda Vista Housing Project site, and later on I appraised the lands known as the Old Cherterton Subdivision. I appraised the lands that were acquired for the Marine Base, which fronted on U. S. Highway 101, and that at the time I appraised it were partially submerged tidelands. For the Spreckels Companies, I appraised what is known as their hog ranch.

Q. What do you mean by the "hog ranch"? Can you [907] point it out to us on one of these exhibits?

A. The ranch refers to this parcel of land here at the southerly end and on the westerly side of San Diego Bay.

Q. Is that tideland?

A. It ran out to mean high tide and fronted on water which was in the neighborhood of 1, 2, 3 to 5 feet in depth.

Q. And where is that with relation to the land with which we are here concerned?

A. Directly across the Bay and slightly to the south.

Q. Proceed, please.

A. Also, I appraised for the Spreckels the lands known as Coronado Heights, which is also south. I had better stay down there at the map so I can point these places out. Down at the extreme south end of the Bay, that land ran partially out into the Bay and part of it was submerged land. Then, also for the Spreckels Company, I appraised what is known as the old golf course or country club which fronted along the Spanish Bight, as well as along the Bay. In addition to those properties, I ap-

(Testimony of Charles B. Shattuck)

praised for the United States of America the lands which were acquired for the Naval Destroyed Base, which are in the vicinity of the property that we are considering today, and the work was done in 1942. At that time I went very carefully into the matter of the various leases which the City of San Diego had and its holdings and tidelands in the City of San Diego. [908]

And, likewise, at that time I conducted a very thorough investigation of the sales of lands in the general vicinity of National City and the Destroyer Base. At the time that appraisal was made, much of the land was privately owned, that the government acquired for that Destroyer Base, was submerged or partially submerged land.

Q. Did you say that land was privately owned?

A. Yes, sir; and it was partially submerged land, that is, it was land which, when there was a high tide, had anywhere from one foot to a couple of feet of water on it.

Q. Mr. Shattuck, in connection with your studies and right at this point I am going to ask you whether or not you know of other tidelands in the State of California which are privately owned.

A. I do; yes.

Q. Tell us about them.

A. There are lands, quite a large block of tidelands, at Anaheim Bay, that are privately owned by the Hellman Company and by the Bixby Company, some 1,000 acres or more there at the entrance to Anaheim Bay. They are noticeable when you drive from San Diego to Los Angeles on U. S. Highway 101. They appear to be sort of sloughs and so forth in there and those lands are all submerged lands. Then in the Harbor of Long Beach there are a number of parcels of privately owned land, tidelands, which front directly upon deep water [909]

(Testimony of Charles B. Shattuck)

channels. Then, also, in the San Francisco Bay area, there are a number of parcels of submerged lands which are adjacent to the Bay, which are privately owned. Right here in San Diego there was some land, that was on the northerly side of Mission Bay, which was under private ownership at one time, which was later acquired by the government, however, that is, land which, during periods of high tide, was flooded land. In addition to the appraisals which I made immediately surrounding the Bay, I appraised a good deal of other property in and about San Diego. I appraised all of the lands that were acquired in Pacific Beach for the building of that project out there. I appraised the land up on Otai Mesa in connection with the extension of that air field, and particularly during the war period I did quite a bit of work in and about San Diego for the United States of America and also for various property owners.

Q. Mr. Shattuck, did you ever buy or sell any land in San Diego?

A. Well, I bought a couple of small pieces up on the Mesa for the government but that is the only buying or selling that I have actually done as a broker here in San Diego. My business here in San Diego—I had an office here for a while during the war, when I was doing quite a bit of work here, particularly on the Destroyer Base, but I never had any occasion to try to conduct any brokerage business here in this [910] particular county, though I did in Los Angeles County.

Q. Are you a member of the San Diego Realty Board?

A. I am a non-resident member of the San Diego Realty Board; yes, sir.

(Testimony of Charles B. Shattuck)

Q. Mr. Shattuck, when did you first become familiar with the lands with which we are here concerned, in a general way?

A. I would say in 1942, at the time I was making the appraisal on the original Destroyer Base site. I went down onto this property in this vicinity at that time and have been familiar with it ever since that time.

Q. Now, were you requested to make an appraisal of the fair market value of the leasehold interest here of the Tavares Construction Company and its associates?

A. I was; yes.

Q. Mr. Shattuck, tell this court and jury who asked you to make that appraisal?

A. The Lands Division of the Department of Justice, Mr. Landrum:

Q. Did you do it? A. I did; yes.

Q. When did you start in on it?

A. On January 28th of 1947.

Q. Is it fair to say that you have been working at that pretty steadily since that time? [911]

A. It is; yes, sir.

Q. Now, Mr. Shattuck, what is the problem which I asked you to consider?

A. You asked me to consider the question of whether or not this lease and option which the Tavares Construction Company had with the Defense Plant Corporation of the United States of America, as of December 23, 1944, had a fair market value and, if so, what that value, in my opinion, was; in other words, what it could have been sold for in the open market to a well-informed purchaser who was fully aware of all the uses and purposes for which the property might be put if they acquired it,

(Testimony of Charles B. Shattuck)

and assuming that a reasonable time was allowed in which to permit the purchaser and the seller to get together, and that neither one was acting under any compulsion to deal, and that was to include not only a consideration of the lease document but also the question of whether or not this option that was in the lease and which, if exercised, would carry with it the site and the machinery and facilities—whether or not that was an element which would be considered by a purchaser and by a seller in reaching a question of whether the price should be one figure or another.

Q. Has anyone ever given you any other instructions than those that I gave you?

A. Absolutely none. [912]

Q. Now, I am going to ask you, Mr. Shattuck, what was the first move that you made when you started this study of this? What did you first consider?

A. I first obtained the lease itself, the document itself, which the property with which I was concerned, as it was the contract, in effect, which would be transferred if the Tavares Construction Company were to exercise its option and later dispose of it, or it was a document under which they had certain rights which this condemnation action was wiping out.

Q. Mr. Shattuck, I show you what is in evidence in this case, a copy of which I understand each member of this jury has, as Exhibit W, and I will ask you to just glance at it and tell us if that is the copy that you started out to study.

A. Yes; it was a copy of this same agreement dated December 27, 1941.

(Testimony of Charles B. Shattuck)

Q. Now, Mr. Shattuck, will you be good enough to tell the court and jury the particular items or particular portions of Exhibit W which you considered? Take that instrument and tell us the studies that you made of it.

A. I studied it carefully paragraph by paragraph, and the first thing I noted in the document was, if the Tavares Construction Company assigned to the Defense Plant Corporation its interest in certain leases which it had previously had with the City of National City, the Defense Plant Cor-[913] poration agreed to purchase those leases, providing the price was satisfactory to the Defense Plant Corporation. Then I noted a number of paragraphs in there which provided for the Tavares Construction Company to proceed to build a shipyard and acquire certain machinery and facilities in the name of and on behalf of the Defense Plant Corporation and with the approval of the Defense Plant Corporation both as to items and as to price. I noted in paragraph Four of the lease that the Defense Plant Corporation agreed to pay for all of the construction costs and aquisition cost of machinery and facilities, subject, however, of course, to the Defense Plant Corporation maintaining checkers and auditors on the job. I noted that in paragraph Five the Tavares Construction Company was to carefully inventory and describe all machinery and facilities purchased or constructed and that same were to be stamped to indicate their ownership by the United States of America. I noted that in any purchase made an officer of the Tavares Construction Company was to certify to the United States of America that the item was necessary and that the price was fair. I noted that the contract was subject to all federal laws that might apply to a contract of this charac-

(Testimony of Charles B. Shattuck)

ter. That is in paragraph Eight. I noted that in paragraph Nine, and this was one particular paragraph that I was interested in, that the United States of America was not to pay for any salaries of officers or the expenses of officers or for overhead, [914] but that the Defense Plant Corporation might, with its own approval, pay the direct expenses of officers or pay for attorney's fees that were necessary, directly with the management of this particular project. I noted in paragraph Ten and the subsequent amendatory documents that were added to the original lease that the rent was fixed on the basis of per ship finished, and that the rent was payable as ships were finished. I noted that in paragraph Eleven of the lease title to the site and all machinery and all facilities was to remain in the Defense Plant Corporation, and that all facilities, machinery and construction works, performed by the Tavares Construction Company on behalf of the Defense Plant Corporation, were to be considered and remain as personal property regardless of the manner in which they might be affixed to the land. I noted in paragraph Twelve that the Defense Plant Corporation agreed to lease to the Tavares Construction Company all of the machinery and facilities and to sublease the site for a period which would end on December 31, 1947, and automatically would extend, if still in effect at that time, to December 31, 1949. This paragraph Twelve also provided that either the Defense Plant Corporation or the Tavares Construction Company should have the privilege of cancelling this particular lease providing it could be shown that the property was no longer needed for the construction of boats for the government. And in paragraph (c) [915] of paragraph Twelve it provided a

(Testimony of Charles B. Shattuck)

method of arbitration in the event there should be any dispute between the Defense Plant Corporation and Tavares as to whether or not this particular site and these facilities were needed for the construction of boats for the government. And it was provided that such arbitration on that particular point, if entered into, should be final and binding upon both parties to the contract. Then paragraph Fourteen, in clause (a), the contract provided that the Defense Plant Corporation could cancel the lease if all or substantially all of the contracts that the Tavares Construction Company had for the construction of boats were cancelled or terminated prior to completion. And in paragraph (b), or clause (b), of paragraph Fourteen, the lease provided that the Defense Plant Corporation could require priority of use of the site and the machinery and the facilities for any other agency of the government, and that the lessee should give such priority and that, if they did not give such priority, the lease could be cancelled, so that it might be transferred to some other department of the government. Then, in clause (c) is also provided that the lease might be cancelled in the event the lessee became insolvent. And in clause (a) it provided that the lease could be cancelled provided the lessee in any manner violated any of the terms or conditions of the lease.

Paragraph Fifteen of the lease provided a method by which, [916] under certain conditions, an option was to be given to the Tavares Construction Company for the purchase of the site and the machinery and the facilities, that is, all of it and not part of it. It provided that this option was to come into effect only under one or two specific conditions, one, provided that the lease was cancelled

(Testimony of Charles B. Shattuck)

pursuant to paragraph Twelve, that is, where either party established the fact that the site was no longer needed for construction of boats by the government, or, under clause (a) of paragraph Fourteen, where the Defense Plant Corporation cancelled the lease because all or substantially all of the contracts which the Tavares Construction Company had for constructing the boats had been cancelled prior to completion.

Q. Did you consider the question of whether or not that option clause would arise if the termination of the contract was brought about by virtue of the fact that the Defense Plant Corporation had the right to turn the priority in this plant here over to some other branch of the government?

A. Yes; I considered that fact in considering the question of the market value of this particular right which they had, this lease, that was an element of uncertainty or chance that any informed purchaser would have to consider, or if this option was to come into existence, in my opinion, only under one of two conditions, and if neither one of those two conditions came about and the government elected to go ahead [917] under clause (b) of paragraph Fourteen, then they would have no option, as I see it. This paragraph Fifteen further set up and provided that, in the event the option did come into existence, the method by which the price would be calculated. There were two methods. One was in clause (a) under that paragraph and it provided that the price would be the actual cost of the facilities in construction of this shipyard plus 4 per cent, less all rental payments made, plus 4 per cent, or the actual cost of the site and the machinery and the facilities, less fixed and stipulated rates of de-

(Testimony of Charles B. Shattuck)

preciation, as set forth in the paragraph, whichever one of those two methods was the greater. And, based on my analysis, it would be my opinion that they would have to figure the latter of the two methods, that is, shown in paragraph (b), that is, if the option was to come into being, the cost to the Tavares Construction Company would have been the actual cost of acquisition of the site plus the actual cost of the acquisition of the machinery and facilities, less the stipulated rates of depreciation. Then, this paragraph Fifteen also contained a clause that the lessee might, with the consent of the Defense Plant Corporation, during the 90-day option period which was granted, negotiate with them for a part of the machinery or facilities. And it also provided, providing it was lawful for the Defense Plant Corporation to do so, that it would agree not to sell any of the machinery or the [918] facilities to any other person, other than another department of the United States government, for a period of 90 days subsequent to the end of the 90-day option period, without first offering it to the Tavares Construction Company at whatever the best bid price was that they had received. And the Tavares Construction Company had a lay-off or refusal period of 30 days in which to say they would or would not take it. And that was provided, of course, it was lawful for them to do that. In paragraph Sixteen the lessee is required to obtain and keep insurance and pay for all insurance necessary to properly protect the machinery and the facilities. In paragraph Seventeen of the lease the lessee was required to keep and to pay for all necessary public liability and property damage insurance, and agreed to save the Defense Plant Corporation harmless from any claims of that character. In para-

(Testimony of Charles B. Shattuck)

graph Eighteen the lessee is required, under that paragraph, to maintain in good repair all of the machinery and all of the facilities, less, of course, usual and normal wear and tear. Paragraph Nineteen permitted the Tavares Construction Company to use this machinery in connection with any other shipyard that the company might own, providing they first had the approval of the Defense Plant Corporation for such use. Paragraph Twenty required that the lessee pay all taxes that might be assessed by the City of National City and the County of San Diego against any of the machinery or [919] the facilities. Then, there were the usual clauses that they would comply with all of the local and State ordinances and laws. And in paragraph Twenty-two the lease provided that this site and these facilities and this machinery should be used only for the construction of boats for the government and that, if this site or any of the facilities or machinery were to be used for any purpose other than for the construction of boats for the government, the Tavares Construction Company should obtain the written permission of the Defense Plant Corporation for such use. [920]

Paragraph 24 provided that the lessee should not sell, assign or pledge this lease in any manner without having the prior written consent of the Defense Plant Corporation. Also, it provided that the lessee should not sublet either all or any part, or the machinery or the facilities, without the prior written consent of the Defense Plant Corporation.

In paragraph 26 it was provided that if the Defense Plant Corporation transferred its interests to any other department of the government, that all of the rights which

(Testimony of Charles B. Shattuck)

it had under the terms of this agreement were vested then in the United States Maritime Commission.

Then there were the usual clauses about no member of Congress being admitted to any profits or benefits from the operation of the contract, and that representatives of the Defense Plant Corporation might be one and the same as representatives of the United States Maritime Commission. Then it provided the method for giving notices, and so forth.

Q. Did you also have available to you the amendments to Exhibit W? A. I did.

Q. Not to Exhibit W, but to the original contract?

A. I did, yes.

Q. Just tell the jury, briefly, what the provisions of the amendments were.

A. There were six amendatory documents affixed to the [921] original lease, and they had to do primarily with the alteration of paragraph 10, which first fixed the amount, the total amount that the government was to expend. For instance, in the original lease the total provided to be spent by the Defense Plant Corporation in paragraph 10 was \$404,500, and in the last amendatory 6, I believe it had reached up to in the neighborhood of \$2,700,000, and those amendatory agreements merely changed those two places in the lease, or amended them as the plans of the government changed with reference to the intensity of use of this particular property. In other words, as the war progressed and the yard came into operation, why, they apparently stepped up their program to build more ships, and it cost more money to buy equipment, and so forth, in accomplishing those ends.

(Testimony of Charles B. Shattuck)

Q. And they also increased the amount of rental which was to be paid by reason of the amount the government had put in?

A. That's right. In paragraph 13 the first amount provided for was that they would pay a rental of \$83,327 per boat, as they finished each boat, and by the time they got through they were paying \$127,000 per boat.

Q. At one time it went up to \$140,000?

A. That's right. On the first five boats they amended it to \$140,000. Thereafter it was \$127,000 per boat until they completed 22 boats. [922]

Q. Now, Mr. Shattuck, after you had been handed that contract, what did you next do? Did you go down and view the property?

A. I believe I overlooked one thing. At least, it comes to my mind, that I should mention.

Q. All right.

A. That is this: There was a proviso in the lease which provided that the Tavares Construction Company was to have the free use of the site, and the machinery and the facilities after they had paid sufficient rent to reimburse the government for the entire cost that it had been put to in the creation of this enterprise. However, that free rent was to be given them only for the construction of boats for the government.

Q. Now, did you go down, then, and go on the premises?

A. Yes, I did. I went all over the property again. Of course, it had been considerably changed because the United States Navy was in possession of the property and had spent very large sums of money in additional work there, and many of the buildings which were placed

(Testimony of Charles B. Shattuck)

on this property by the Tavares Construction Company had been either totally removed or partially removed.

Q. All right. Then what further documents or instruments, if any, did you get in order to proceed with this question which was before you? [923]

A. Well, I obtained certain correspondence, letters, and so forth, that had passed back and forth between various departments of the government and the Tavares Construction Company.

Q. By that do you mean that you had available to you what is in evidence in this case as Plaintiff's Exhibit 2, Plaintiff's Exhibit 3, and Plaintiff's Exhibit 4, Mr. Shattuck?

A. Yes. I had read all of those letters to which you refer. In addition to that, there were some other letters that had passed, that were dated subsequent to the date of taking here, but which contained information, for instance, with reference to the amount of taxes that were payable by the Tavares Construction Company on the facilities and on the machinery, and referred to such items as—

Mr. John M. Martin: Just a moment. I object to the witness going into all those matters. Counsel for the government has specifically inquired as to certain documents.

The Court: Yes.

Mr. Landrum: Yes, I think so.

Q. By Mr. Landrum: Now, what I want to get at, did you then begin the study of the problem to be developed by you under sub-section (b) of paragraph 15,

(Testimony of Charles B. Shattuck)

that is, this option proposition? In other words, did you start to figure out the depreciated value on these facilities?

A. Yes. I had to make an estimate as to what, in my [924] opinion, assuming the option had come into being, what the possibilities were of that option having some market value.

Q. What did you do in order to pursue that study?

A. In that connection I obtained the Assets-Property Record of the Defense Plant Corporation, which set forth in detail each item purchased, and a description of it, as well as the actual cost of that item and the time when it was purchased, and from that I had to ascertain from the Defense Plant Corporation how it was classified, because there were three different schedules of depreciation. For instance, buildings, and ways, and docks, and direct improvements to land, and matters of that kind, were to be depreciated at the rate of five per cent per annum. Then there was machinery, which was to be depreciated at the rate of 10 per cent per annum; and then the small hand tools, and matters of that kind, were to be depreciated at the rate of 25 per cent per annum. So I had to classify those different items of personal property and construction, so as to be able to apply the rates of depreciation to the original cost, as required by the terms of the lease agreement,—

Q. Did you arrive at—

A. —and I made a calculation, and arrived at a figure, which resulted in a check against estimates made by the Tavares Construction Company, and which I believe you have stipulated to here in this court room and which is [925] referred to, I believe, as Exhibit Q, which is a tabulation showing each item and showing the depreciated

(Testimony of Charles B. Shattuck)

cost, which would be the option price at which that particular item could be purchased.

Q. In other words, your figures were so close to those that had been reached by Mr. Smith that we just stipulated to it and put this Exhibit in?

A. That is right. My figure was within \$23,000 of his. and on a matter involving better than \$2,000,000, and with a question of whether you had a thing, a particular piece of machinery classified correctly or incorrectly, why, I felt that was as near as we could ever be able to get together.

Q. Yes, all right. Then tell us, Mr. Shattuck, after you had gotten that material together, what further studies did you feel it was necessary for you to make in order to evaluate this Exhibit W?

A. Well, I had to—in connection with the estimate as to whether or not, if this option came into being, it would be marketable at any price, I had to form some conclusion as to the value of that site.

Q. You mean in case you reached a conclusion that the option could come into being?

A. That is right.

Q. Now, what did you do to evaluate that site? [926]

A. Well, in connection with the evaluation of that site, I approached it first from the angle of what was there. In other words, I started out with the land, as I knew it to be; that is, merely tideland or mud flats, prior to the time that any fill or spoil had been placed upon it. I knew from my own knowledge and study of sales of similar mud-flat lands in and about San Diego Bay, what unimproved raw land of that type would command per acre. Then I calculated the amount of spoil that had been

(Testimony of Charles B. Shattuck)

pumped on to this site at the time the main channel was dredged down San Diego Bay, when they deepened that main channel to 30 feet, and that raised the elevation of this land, the submerged land to spoil-filled ground of, we will say, approximately 10 feet elevation.

Then that was the condition, in my opinion, in which this site was before the Tavares Construction Company entered upon it, except for the work which had been done by the San Francisco Bridge Company on parcel No. 7, I believe it is on the exhibit.

Q. Now, of course, you understood, did you not, that in addition to the particular lands with which we are here concerned in the trial of this action, there are three other parcels, parcels 4, 10 and 11, do you not?

A. Yes, that's right, but in this particular problem which I am faced with, I am not concerned with them except they are included as a part of this whole site. In other [927] words, there is 100.32 acres all together that I am concerned with, and some of them were disposed of by settlement.

Q. Yes. And you knew what the government had to pay for that?

A. Yes, I was familiar with the amount the government had to pay for that.

Mr. Landrum: All right. Does your Honor wish to take the noon recess?

The Court: Yes. Two o'clock, ladies and gentlemen. Remember the admonition and keep its terms inviolate.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock P. M. of the same day.) [928]

